TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 216.

FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN ET AL., BOARD OF DIRECTORS OF THE FARMERS IRRIGATION DISTRICT, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NEBRASKA ON THE RELATION OF PETER O'SHEA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED AUGUST 11, 1916.

(24,870)

(24,876)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 28, 1916.

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1 No. 18880.

STATE ex Rel. O'SHEA
v.
FARMERS IRRIGATION DISTRICT.

Pleas: Before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the capitol in the city of Lincoln, in said State on the 4th day of January, 1915.

Present:

Hon. Andrew M. Morrissey, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk.*

Be It Remembered, That on the 22nd day of October, 1914, there was filed in the office of the clerk of said supreme court a certain Transcript, in the words and figures following, to-wit:

2 Pleas had before Hon. R. W. Hobart, Judge of the District Court of the Seventeenth Judicial District, in and for Scotts Bluff County, State of Nebraska, at a term begun on the 2nd day of February, 1914, and hearing had in this case on the 7th and 30th days of March — and on the 2nd day of May 1914.

Be It Remembered, That heretofore, to-wit on the 7th day of March, 1914, the Petition in words and figures following to-wit: was filed in the office of the Clerk of the District Court.

3 In the District Court of Scotts Bluff County, Nebraska.

THE STATE OF NEBRASKA on the Relation of PETER O'SHEA, Relator,
vs.
FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON, and William J. Otte, Board of Directors of the Farmers Irrigation District, Respondents.

Petition.

Comes now the above named plaintiff and for cause of action, alleges and says:

1. That the Farmers Irrigation District is a corporation duly

organized and existing under and by virtue of an act to provide for the organization and government of irrigation districts, and to provide for acquiring of canals already built or partly constructed, for the acquiring of the right of way to build irrigation ditches or canals, and other property, for the dividing of certain portions of the territory of the State of Nebraska into irrigation districts, and for said irrigation districts to vote bonds for the purpose of constructing irrigation canals for the purpose of buying and purchasing by said irrigation districts irrigating canals already constructed, or partially constructed, and the paying for the same, providing for a system of revenue to be raised by taxation upon the property in said irrigation districts to pay the interest and principal of said bonds, and the manner in which the same shall be done, the holding of elections in said districts for the purpose of electing officers and providing for the management of said districts, also providing for the increase and enlargement of said district whenever it may be necessary or best to increase their size. Approved March 26th, 1895, and all acts amendatory thereof and supplementary thereto.

4 2. That William Holden, David Henderson, William J. Otte, respondents, are the duly elected, qualified and acting Board of Directors of said Farmers Irrigation District.

3. That the Farmers Irrigation District is the owner of an irrigation canal beginning in Section 10, township 23, north, range 58, west of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, and extending in an easterly direction a distance of about seventy miles which said canal is built with banks ranging from four to ten feet high and excavated in the ground to an average depth from two and one-half to three feet in depth, and is forty-six feet wide on the bottom, with banks with a slope of 1 1/2 to one foot, which said canal from the bottom of the excavation of the same to the top of the bank is from eleven to thirteen feet in depth, and during the irrigation season said canal carries water to a depth of from five to seven feet, and said canal intersects the east half of the southwest quarter and the west half of the southeast quarter of Section 18, township 22, North, Range 53, West of the Sixth Principal Meridian, so that about 26 acres of said above described real estate lies wholly south of the right of way of said canal.

4. That the relator herein is the owner of the above described real estate, and has been the owner of the same for several years past.

5. That that portion of said above described real estate lying north of the right of way of said canal does not abut upon any public highway, nor has the relator herein any private way from said above described real estate lying north of said canal to any highway. That the only convenient way that said real estate on the north side of said canal can be used with that on the south side is to construct a bridge across said canal. That, that portion of said land lying south of said canal abuts upon a public highway, but that portion lying north of the right of way of said canal is completely cut off from any public highway, because of the fact that said canal forms

an impassable barrier, unless a bridge is constructed over the
5 same. That, that portion of said above described real estate north of said canal is a quarter of a mile from the east side of the same to a public highway, and is also a distance of a quarter of a mile from the west side of said real estate to a public highway, and is also a distance of one half mile from the north side of the same to a public highway, without any private highway leading to any of said highways, and the lands between the east, west and north side of said real estate, and the public highways are held in private ownership. That it is necessary for the free and convenient use of the above described lands on both sides of said canal by the owner thereof that the owner of said canal erect a suitable and convenient bridge across said canal.

6. That demand has been made upon the respondents as the Board of Directors of the Farmers Irrigation District, the owner of said canal, to erect a bridge across said canal at a point to be indicated by the relator herein on said above described premises. That respondents herein have refused to erect said bridge.

7. That all of said above described real estate lying north of the right of way of said canal has been brought to a high state of cultivation during the last four years, and during the crop season of 1914, eighty acres of the same will be planted to beets, which said beets will have to be delivered to the Scotts Bluff Sugar Company during the time the same are harvested; and that the owner of said premises has no way of ingress and egress from that portion of said premises lying north of the right of way of said canal except through the private property of others.

8. That the relator intends to erect a dwelling and other suitable buildings on that portion of said premises lying south of the right of way of said canal during the present season, and that it will be inconvenient to farm said real estate lying north of the right of way of said canal, unless a substantial and convenient wagon bridge is
erected by the respondents across the same at a point to be
6 designated by this relator on said above described premises.

Wherefore, relator prays that an alternative writ of mandamus issue to the respondents herein, commanding them forthwith to erect a suitable and convenient wagon bridge across said canal at a point to be designated by the relator herein on said premises or to show cause why a peremptory writ of mandamus should not issue against the respondents commanding them immediately upon receipt of the same to construct said bridge.

PETER O'SHEA,
By W. M. MORROW.

7 STATE OF NEBRASKA,
Scotts Bluff County, ss:

Peter O'Shea, of lawful age, being first duly sworn upon his oath deposes and says: That he is relator in the above entitled cause of action, that he has read over said petition, and knows the contents thereof, and that the facts therein stated are true.

PETER O'SHEA.

Subscribed in my presence and sworn to before me this — day of March A. D. 1914.

[SEAL.] MARY I. SHARP,
Notary Public.

8 And afterwards on the same day, to-wit: March 7th, 1914, there was recorded in the Journal of this Court an Order in words and figures following, to-wit:

9 In the District Court of Scotts Bluff County, Nebraska.

THE STATE OF NEBRASKA ex Rel., Relator,
vs.
FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON, William J. Otte, Board of Directors of the Farmers Irrigation District, Respondents.

Order.

Now on this 7th day of March, A. D. 1914, the same being one of the regular days of the February, 1914 term of the District Court within and for Scotts Bluff County, came the relator and filed his petition in this court, duly verified, praying for a writ of mandamus against the respondents, and it appearing that said respondents had due notice of the time and place of said hearing, and no sufficient reason being shown against issuing the same, it is ordered that an alternative writ of mandamus issue against said Farmers Irrigation District, William Holden, David Henderson, and William J. Otte, the Board of Directors of the same, commanding them to erect a suitable and convenient wagon bridge across the canal of the Farmers Irrigation District, at a point to be indicated on the west half of the Southeast quarter and the east half of the southwest quarter of Section 18, township 22, North, Range, 53, West of the Sixth Principal Meridian, returnable on the 28th day of March, 1914.

R. W. HOBART, *Judge.*

10 And afterwards on the same day to-wit: March 7th, 1914, there was issued by the Clerk of the District Court, an Alternative Writ of Mandamus in words and figures following, to-wit:

11 In the District Court of Scotts Bluff County, Nebraska.

THE STATE OF NEBRASKA on the Relation of PETER O'SHEA, Relator,
vs.
FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON, and WILLIAM J. OTTE, Respondents.

STATE OF NEBRASKA,
Scotts Bluff County:

Alternative Writ of Mandamus.

To the Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District:

Whereas, it has been suggested to us by petition to Peter O'Shea, relator, positively verified, that the Farmers Irrigation District is a corporation duly organized and existing under any by virtue or an act to provide for the organization and government of irrigation districts, and to provide for acquiring of canals already built or partly constructed, for the acquiring of the right of way to build irrigation ditches or canals, and other property, for the dividing of certain portions of the territory of the State of Nebraska into irrigation districts, and for said irrigation districts to vote bonds for the purpose of constructing irrigation canals for the purpose of buying and purchasing by said irrigation district irrigating canals already constructed, or partially constructed, and the paying for the same, providing for a system of revenue to be raised by taxation upon the property in said irrigation districts to pay the interest and principal of said bonds, and the manner in which the same shall be done, the holding of elections in said districts for the purpose of electing officers and providing for the management of said districts, also providing for the increase and enlargement of said districts whenever it may be necessary or best to increase their size. Approved March 26th, 1895, and all acts amendatory thereof and supplementary thereto.

12 That William Holden, David Henderson, William J. Otte, respondents, are the duly elected, qualified and acting Board of Directors of said Farmers Irrigation District.

That the Farmers Irrigation District is the owner of an irrigation canal beginning in Section 10, township 23, north, range 58, west of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, and extending in an easterly direction a distance of about seventy miles, which said canal is built with banks ranging from four to ten feet high and excavated in the ground to an average depth from two and one-half to three feet in depth, and is fort*h*-six feet wide on the bottom, with banks with a slope of 1½ feet to one foot, which said canal from bottom of the excavation of the same to the top of the bank is from eleven to thirteen feet in depth, and during the irrigation season said canal carries water to a depth of from five to

seven feet, and said canal intersects the east half of the southwest quarter and the west half of the southeast quarter of Section 18, Township 22 North, Range 53 West of the Sixth Principal Meridian, so that about 26 acres of said above described real estate lies wholly south of the right of way of said canal.

That the relator herein is the owner of the above described real estate, and has been the owner of the same for several years past.

That, that portion of said above described real estate lying north of the right of way of said canal does not abutt upon any public highway, nor has the relator herein any private way from said above described real estate lying north of said canal to any highway. That the only convenient way that said real estate on the north side of said canal can be used with that on the south side is to construct a bridge across said canal. That, that portion of said land lying south of said canal abutts upon public highway, but that portion lying north of the right of way of said canal is completely cut off
13 from any public highway, because of the fact that said canal forms an impassable barrier, unless a bridge is constructed over the same. That, that portion of said above described real estate north of said canal is a quarter of a mile from the east side of the same to a public highway, and is also a distance of a quarter of a mile from the west side of said real estate to a public highway, and is also a distance of one-half mile from the north side of the same to a public highway, without any private highway leading to any of said highways, and the lands between the east, west and north side of said real estate, and the public highways are held in private ownership. That it is necessary for the free and convenient use of the above described lands on both sides of said canal by the owner thereof that the owner of said canal erect suitable and convenient bridge across said canal.

That demand has been made upon the respondents as the Board of Directors of the Farmers Irrigation District, the owner of said Canal, to erect a bridge across said canal at a point to be indicated by the relator herein on said above described premises. That respondents herein have refused to erect bridge.

That all of said above described real estate lying north of the right of way of said canal has been brought to a high state of cultivation during the last four years, and during the crop season of 1914 eighty acres of the same will be planted to beets, which said beets will have to be delivered to the Scottsbluff Sugar Company during the time the same are harvested; and that the owner of said premises has no way of ingress and egress from the portion of said premises lying north of the right of way of said canal except through the private property of others.

That the relator intends to erect a dwelling and other suitable buildings on that portion of said premises lying south of
14 the right of way of said canal during the present season, and that it will be inconvenient to farm said real estate lying north of the right of way of said canal, unless a substantial and convenient wagon bridge is erected by the respondents across the same

at a point to be designated by this relator on said above described premises. That the relator has no adequate remedy at law.

Now, therefore, I being willing that full and speedy justice should be done in the premises do command you that you erect a substantial and convenient bridge across said canal on said premises at a point to be indicated by the owner of said premises, or that you appear before the District Court at the Village of Gering, Scotts Bluff County, Nebraska, on the 28th day of March, A. D. 1914 at ten o'clock A. M. to show cause why you refuse to do so.

Witness R. W. Hobart of the 17th Judicial District of Nebraska, and the seal of said Court hereto affixed this 7th day of March, A. D. 1914.

[SEAL.]

M. H. McHENRY,
Clerk of the District Court.

STATE OF NEBRASKA,
Scotts Bluff County, ss:

Received this writ on the 9th day of March 1914, and I, on the 10th day of March served the same upon the within named Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, by delivering to each of the above named members of the Board of Directors a true and cvertified copy of the within writ with all endorsements thereon. And I served upon the Farmers Irrigation District by delivering to William Holden, personally as chairman of said Board, a true and certified copy of the within writ with all endorsements thereon all done in Scotts Bluff County, Nebraska.

F. O. AARON, *Sheriff.*

Fees:

Service	$1.25
Copy	1.00
Mileage	1.50
Total	$3.75

15 And afterwards on the 28th day of March, 1914 there was filed in the Office of the Clerk of the District Court an answer and return to the Writ of the Defendants.

16 In the District Court of Scotts Bluff County, Nebraska.

THE STATE OF NEBRASKA on the Relation of PETER O'SHEA, Relator,
vs.
FARMERS' IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON, and William J. Otte, Board of Directors of the Farmers' Irrigation District, Respondents.

Answer and Return.

Come now the respondents and for return to the alternative writ of mandamus heretofore issued and in answer to petition of relator say:

(1). That respondents admit paragraphs 1, 2, 3 and 6 of relator's petition.

(2). That respondents have not sufficient knowledge as to the facts stated in paragraphs 5, 7, and 8 of relator's petition to admit the same and therefore denies the same upon information and belief.

(3). For further answer to paragraph 4 of relator's petition respondents deny that the relator owns the East Half of the Southwest Quarter (E. 1/2 S. W. 1/4) and the West Half of the Southeast Quarter (W. 1/2 S. E. 1/4) of Section Eighteen (18) Township Twenty-two (22) North, of Range Fifty-three (53) and allege and say, that relator owns two separate and several tracts of land each of which said tract is a part of said East Half of the Southwest Quarter and the West Half of the Southeast Quarter of the section eighteen (18), the land owned by said relator being as follows, to-wit; A tract of land described as follows;

All that part of the East Half of the Southwest Quarter and the West Half of the Southeast Quarter of said Section Eighteen (18) lying north of an above the canal and right of way of the Farmers Mutual Canal Company's canal, said tract containing 120.7 acres, and a tract of land described as follows, all that prt of the East Half of the Southwest Quarter and the West Half of the Southeast
17 Quarter of said Section Eighteen (18) lying south of and below the canal and right of way of the Farmers Mutual Canal Company's canal, said tract of land containing 26.2 acres; that a part of said East Half of the Southwest Quarter and the West Half of the Southeast Quarter of said section eighteen (18), to-wit; 13.1 acres thereof consisting of the canal and right of way of the Farmers Irrigation District is owned by the respondent Farmers Irrigation District and is not owned by the relator.

(4). For further and additional answer respondents allege that all of the East Half of the Southwest Quarter and the West Half of the Southeast Quarter of said Section eighteen was, on and prior to the year 1906, owned by the Tri-State Land Company; that said Tri-State Land Company while the owner of said land caused an irrigation ditch or canal to be constructed over and across the same, the said irrigation ditch and canal being the same that is now owned by the respondent, Farmers Irrigation District, the said Tri-State Land Company being at the time of the construction of said canal the owner of both said canal and said lands; that thereafter the Tri-State Land Company sold and conveyed said canal together with the right of way for the same to Farmers Mutual Land Company and the said Farmers Mutual Canal Company thereafter sold and conveyed said canal, together with right of way for same to the respondent, Farmers Irrigation District and said Farmers Irrigation District is now the owner thereof. That said Tri-State Land Company after the building of said irrigation canal treated the land in the East Half of the Southwest Quarter and the West Half of the Southeast Quarter of said Section Eighteen (18) as two separate tracts and parcels of land, to-wit, that part lying above the right of way and canal hereinbefore mentioned and that part lying

south of and below said canal and right of way; that said Tri-State Land Company sold and conveyed the same at different times and as two separate tracts of land to the relator Peter O'Shea, to-wit, the said Tri-State Land Company by deed dated April 25th, 1910
18 and recorded May 4th, 1910 in Book "O" of deeds of Scotts Bluff County, Nebraska at page 571 conveyed to said relator Peter O'Shea all that part of the West Half of the Southeast Quarter and the East Half of the Southwest Quarter of said Section Eighteen lying north of and above the right of way of the Farmers Mutual Canal Company's canal and later, to-wit, on the 14th day of July, 1911 by deed recorded July 20th, 1911 in Book "Q" of Deeds of Scotts Bluff County, Nebraska, at page 312 conveyed to the relator Peter O'Shea that part of the East Half of the Southwest Quarter and the West Half of the Southeast Quarter of said section Eighteen (18) lying south of and below the canal and right of way of the Farmers Mutual Canal Company, the first of said tracts containing 120.7 acres and the second of said tracts containing 26.2 acres; that said relator Peter O'Shea purchased said land after the construction of said irrigation canal and at different times as two separate and distinct tracts of land divided from each other by the right of way and canal of the Farmers' Mutual Canal Company, the same being the canal constructed by the Tri-State Land Company and now owned by the respondent, Farmers Irrigation District. Respondents further allege that all the rights of the relator Peter O'Shea are derived from and through the Tri-State Land Company and under the conveyances hereinbefore set forth and that said relator has no greater or other right in the premises than the said Tri-State Land Company would have.

(5). Respondents for further and additional defense allege and say that Section 3438 of the revised Statute of the State of Nebraska for the year 1913 which attempts to confer the right on land owners under certain circumstances to compel the owners of irrigation canals to build bridges thereover is unconstitutional, null and void; that said section deprives your respondent, Farmers Irrigation District of its property without due proces of law and deprives the respondents, Farmers Irrigation District of equal protection
19 of the law and is class legislation in this, that section purports to require the building of certain bridges only by the owners of irrigation canals and does not apply to other canals of similar nature carrying water such as drainage canals and *will* races.

Wherefore these respondents having fully answered and made return and shown cause why the prayer of relator's petition should not be granted, pray that the prayer of relator's petition be denied; that these respondents go hence without day and recover their costs of suit herein expended.

F. A. WRIGHT &
J. G. MOTHERSEAD,
Attorneys for Respondents.

STATE OF NEBRASKA,
Scotts Bluff County, ss:

F. A. Wright being first duly sworn deposes and says that he is attorney for the respondents in the above entitled action; that the respondents Farmers Irrigation District is a public corporation organized under the laws of the State of Nebraska relative to irrigation districts; that affiant has read the foregoing answer and return and that the facts therein stated are true as he verily believes.

F. A. WRIGHT.

Subscribed in my presence and sworn to before me this 28th day of March, 1914.

[SEAL.]

M. H. McHENRY,
Clerk District Court.

20 And afterwards, to-wit on the 30th day of March, 1914 there was recorded in the Journal of this Court a Journal in words and figures following, to-wit:

21 In the District Court of Scotts Bluff County, Nebraska.

THE STATE OF NEBRASKA, on the Relation of Peter O'Shea, Plaintiff,
vs.
THE FARMERS' IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON, & WILLIAM J. OTTE, Board of Directors of the Farmers' Irrigation District, Defendants.

Journal Entry. 917.

Now on this 30th day of March, A. D. 1914, the same being one of days of the February, 1914, term of the District Court within and for Scotts Bluff County, Nebraska, this cause came on for trial to the Court on the alternative writ and the answer; and the evidence and the court having listened to the arguments of Counsel and being fully advised in the premises, takes cause under advisement.

22 And afterwards, to-wit on the 2nd day of May, 1914, there was recorded in the Journal of this Court a Journal in words and figures following, to-wit:

23 In the District Court of Scotts Bluff County, Nebraska.

THE STATE OF NEBRASKA, on the Relation of Peter O'Shea, Plaintiff,
vs.
FARMERS' IRRIGATION DISTRICT, William Holden, David Henderson, and William J. Otte, Board of Directors of the Farmers' Irrigation District, Defendants.

Journal Entry. 917.

May 2, 1914, the Court finds that the Farmers' Irrigation District is the owner of the Irrigation Canal described in the alternative

writ, that said canal was constructed by the Tri-State Land Company across the lands described in the alternative writ to approximately the dimensions mentioned in said writ during the year 1906 and that during the said year and prior thereto, The Tri-State Land Company, was the owner of the east half of the South-west Quarter and the West half of the South east quarter of Section 18, Township 22, Range 53 West of the Sixth P. M.; that said canal is constructed across said last described premises; that on or about the 25th day of April, 1910, the Tri-State Land Company conveyed all that part of the east half of the South west Quarter of said section 18 lying and being north of the canal described in the Alternative Writ, and all that part of the West Half of the South East Quarter of said section 18 lying and being north of the canal described in the alternative writ to Peter O'Shea, the relator herein, and on or about the 14th day of July, 1911, the Tri-State Land Company conveyed all that part of the West Half of the South East Quarter of said Section 18 lying and being south of the canal described in the alternative writ and all that part of the East Half of the South West Quarter of said Section 18 lying and being south of the canal described in the alternative writ to Peter O'Shea, the relator herein; that the Tri-State Land Company after the construction of said canal sold and conveyed the same together with the right-of-way to the Farmers' Mutual Canal Company and the Farmers' Mutual Canal Company in turn sold and conveyed said canal together with said right of way to the Respondent Farmers' Irrigation District herein, and that portion of the West half of the South east Quarter and that portion of the east half of the South West Quarter of said Section occupied by the right of way of said canal was never owned by Peter O'Shea, the relator herein.

It is therefore considered and adjudged by the court that a peremptory writ of mandamus be denied and that this action be dismissed at the costs of the relator and that the respondent be given forty days from the rising of Court to prepare and present bill of exceptions. Supersaed-as bond fixed in the sum of $200.00, to all of which ruling and findings the respondent excepts. Exception allowed.

Judge.

STATE OF NEBRASKA,
Scotts Bluff County, ss:

I, M. H. McHenry, Clerk of the District Court in and for said County, do hereby certify that the within and foregoing is a true and compared copy of the Petition, Alternative Writ of Mandamus, Answer and Return, as the same appears in the files in the within entitled case, also the Journal Entries as they appear of record in the Journal of this Court.

I further certify that the Bill of Exceptions hereto attached and made a part of this Transcript, is the original Bill of Exceptions signed and settled in the within entitled case.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the District Court this 16th day of October, A. D. 1914.

[SEAL.]

M. H. McHENRY,
Clerk District Court.

Endorsed: 18880. State ex rel. O'Shea v. Farmers' Irrigation District Transcript, Supreme Court of Nebraska. Filed Oct. 22, 1914. H. C. Lindsay, Clerk.

26 And on the same day there was filed in the office of the clerk of said supreme court, a certain Bill of Exceptions, in the words and figures following, towit:

27 In the District Court of Scotts Bluff County, Nebraska.

THE STATE OF NEBRASKA on the Relation of Peter O'Shea, Relator,
v.
FARMERS' IRRIGATION DISTRICT, William Holden, David Henderson and William J. Otte, Respondents.

Bill of Exceptions.

Appearances:

William Morrow, Esq., For Relator.
F. A. Wright, Esq., For Respondents.

SCOTTS BLUFF, NEB., May 14, 1914.

Received from the attorney for the Relator for examination and amendment the within draft of a proposed bill of exceptions.

F. A. WRIGHT AND
J. G. MOTHERSEAD,
Attoreys for Respondents.

I herewith return the within bill of exceptions heretofore submitted for examination and amendment, and propose the following amendments thereto: —— —— —— ——

F. A. WRIGHT AND
J. G. MOTHERSEAD,
Attorneys for Respondents.

28 Be it remembered, that at the February, 1914 term of the District Court of Scotts Bluff County, Nebraska, to-wit: on the 30th day of March, that being one of the days of said term, the cause of the State of Nebraska on the Relation of Peter O'Shea, Relator, v. Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Respondents, came on for hearing before Honorable R. W. Hobart, Judge; and the Relator and the Respondents each to maintain the isuues of their respective parts, adduced testimony and offered evidence, and all of said evidence and testimony, all of the

objections thereto with the grounds therefor, all of the rulings of the court on such objections, together with all of the exceptions to such rulings made and taken at the time, having been by the Relator herein reduced to writing in this his bill of exceptions, and the said Relator having served the same upon the attorney for the Respondents for examination and amendment, as required by law, said Relator now prays the court before which said cause was tried that said bill of exceptions may be now settled, allowed, signed, sealed and made a part of the record in said cause in said court.

29 *Stipulation.*

It is hereby stipulated by and between the parties hereto for the purpose of this trial that that portion of said real estate described in plaintiff's petition lying north of the right of way of the Farmers Irrigation District's canal does not abut upon any public highway.

PETER O'SHEA, was called as a witness in behalf of Relator, and being first duly sworn on oath testified as follows:

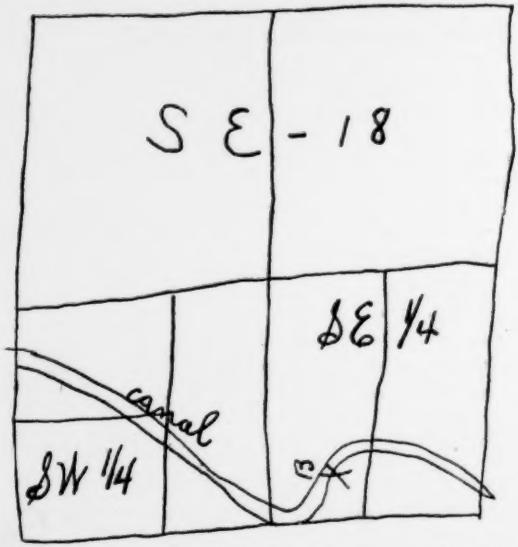
Direct examination by Mr. Morrow:

1 Q. Calling your attention to Relator's Exhibit 1, I will ask you to tell the court what that Exhibit is?
2 Q. Yes?
A. Well, it is a map of Section 18.
3. Q. What township and range?
A. 22-53.
4. Q. Mark the Southeast quarter of that by the letters "S. E. and ¼"?
A. I have.
5. Q. And the Southwest also by "S. W."?
A. I have.
6. Q. Now then, you may tell the court which part of Section 18 is the land that you own?
A. Well, I own all of the east ½ of the Southwest and the West half of the Southeast, except the canal right of way.
7. Q. Have you indicated on the drawing, and particularly on the portion of Section 18 that you own, the direction and as nearly as possible the course of the canal?
A. I have.

30 Direct examination of Peter O'Shea, continued:

8. Q. And how is that marked on the map?
A. What do you mean?
9. Q. How is it designed?
A. As a canal.

Mr. Morrow: We now offer in evidence Relator's Exhibit 1.
Relator's Exhibit 1 is received in evidence without objection, is attached hereto and made a part of this bill of exceptions, and is as follows:



31 Direct examination of Peter O'Shea, continued.

10. Q. State to the court whether or not the portion of land owned by you north of the right of way of the canal abuts upon any highway?

A. It does not.

11. Q. Now, have you any way of getting in and out to this particular piece of land?

A. No,—ran along the ditch bank a few times,—you mean any public way?

12. Q. Yes?

A. No.

13. Q. Tell the court how this land can be used with the land on the south side of the canal?

A. Well, it can only be used by a bridge.

14. Q. What use do you make of the land lying north of the right of way of the canal?

A. Farm it.

15. Q. When did you begin farming this land?

A. I think four years ago, I put it in crop the spring after I bought it,—what is the date of the deed,—we put it in the next spring after I bought it.

Mr. Wright: April 25, 1910, and the other was the 14th day of July, 1911.

A. (continued:) If it was in in April I think it was that season of 1910, as I recollect it, the first spring after I bought it we plowed it up and put it in crop.

16. Q. What crop did you put in?

A. Alfalfa and oats.

17. Q. And what kind of crops are growing on this place at this time?

A. Alfalfa.

18. Q. What crop have you intended to plant it to this coming season?

A. Well, there would be between 80 and 90 acres of sugar beets, and the balance in alfalfa.

32 19. Q. Have you constructed any buildings on this land?

A. I have not.

20. Q. Have you made any preparation for the construction of buildings?

A. I have.

21. Q. You may state to the court what provision you have made for constructng buildings on this place, and where they will be constructed, if any?

A. I let a contract to build a house here in this corner on that portion of the west half of the southeast, south of the canal.

22. Q. When did you let that contract?

A. Last week.

Cross-examination.

By Mr. Wright:

23. Q. When you first knew this land, Mr. O'Shea, had the canal that is now owned by the Respondents been constructed.

Mr. Morrow: We will admit the construction of that canal.

24. Q. You first commenced farming this land,—the crops that you put north of the respondent's canal was the same year that it was bought by you?

A. Yes, sir.

25. Q. And if that was in 1910, then the first farming was in 1910?

A. That is right after I got title to it.

26. Q. You had no bridge across the canal at that time?

A. No, sir.

27. Q. And each year since you have been farming that land?

A. Yes, sir.

28. Q. And during all the time without the use of any bridge crossing the canal?

A. Yes, sir.

29. Q. How have you crossed the respondents' canal to get to this land?

A. Crossed it at the bridge east of it, and the bridge west of it, and come around the ditch bank.

30. Q. You have followed around the ditch bank to the

33 land?

A. Yes, sir.

31. Q. Is there a road along the north side of the ditch bank?

A. No, we was on top of the bank.

32. Q. You followed the top of the bank?
A. Yes sir.
33. Q. There has been no objection made to your doing that?
A. No.
34. Q. By the use of the north bank of the respondents' canal you are able to farm this land, and get to it?
A. Well, you are able to get to it and able to farm it, but you cannot bring your crops out from it, it is so narrow, there is barely a track for a wagon,—I consider it dangerous.
35. Q. Well, the respondent has a 150 foot right of way through there, would it be possible for you to make the highway along the north side of the bank on their right of way?
A. I don't know just how far their right of way goes,—Shoemaker has it fenced up to the bank, and he claims the right of way has not been used on the north side, and there is a borrow pit in there.
36. Q. That is not on your land?
A. No.
37. Q. That is at a point below?
A. No, it is west of my land, Shoemaker's fence abuts up to the bank.
38. Q. So it is necessary for you to use the bank?
A. Yes, sir.
39. Q. Have you any other means of getting in to your land?
A. Why, I have used the private road of a neighbor there, go through his place, but he shut that up a short time ago,—Myer's.
40. Q. A road north?
A. Yes, through Myer's place, into his buildings.
41. Q. And you have no special agreement with him as to the use of that road?
A. No.
42. Q. Has he forbidden you the use of that road?
34 A. No, he has shut the fence up, is all.
43. Q. Now, you purchased these lands from the Tri-State Land Company?
A. I did.
44. Q. You knew the conditions existing at the time you purchased the land?
A. Yes, sir.
45. Q. And at the time you purchased this land on the north of the canal you knew that there was no roadway into the lands?
A. Yes, sir.
46. Q. At that time, and when you carried on those farming operations for the first year at least, you did not own the land that you have now on the south side of the canal?
A. No.
47. Q. So that at that date a bridge would have been of no benefi to you across the canal at this point?
A. Unless it would be put where the canal touches the section line, where the check is in the canal.
48. Q. It is not a question of putting the bridge on the section lin that you are asking now?

A. No no, not at all.
49. Q. What you ask is a private way?
A. Yes, sir.
50. Q. And not a section line bridge?
A. No, sir.

Redirect examination.

By Mr. Morrow:

51. Q. This land on the north side touches land between the ditch and a highway, does it?
A. Yes, sir.

Recross-examination.

By Mr. Wright:

52. Q. Is that a public road?
35 A. It is a section line, and they may travel it all the time, so far as it being general, I don't know.
The Court: Is there anything on the west?
The Witness: There is a road betwen 13 and 18 and a road between 18 and 17, but my land is the east half of the southwest.
53. Q. There is nothing on this side? (Indicating on Exhibit 1.)
A. No.
54. Q. And all there is is this road down here?
A. Yes sir.

Reredirect examination.

By Mr. Morrow:

55. Q. Now, Mr. O'Shea, assuming that your buildings are constructed at the point that you have already let the contract for their construction, how far would you have to travel from those buildings, assuming that you may travel the bank of the canal, in order to get to your land?
A. Well, he would have to travel over half a mile wesr and then go north.
56. Q. How far north would he have to go?
A. I don't know,—I think very nearly a quarter, Shoemaker's is a forty, and if you went the other way it would be a little nearer, but they have never used the bank there,—the road has been in from the Shoemaker end.
57. Q. State to the court whether or not it is possible to travel this bank with heavy loads?
A. It is impossible, because you go out on to the bridge,—you cannot turn to get on to the bridge, and there is barely room for a wagon track,—you have probably got a foot or a foot and a half on each side of the wheel.

Re-recross-examination.

By Mr. Wright:

58. Q. There is a highway running along the south side of Section 18 as I understand it?

A. Yes sir.

59. Q. And does the canal interfere with the travel on that highway?

A. It does not.

60. Q. Now, where along the canal do you desire the bridge put, put an "X" across the canal on Exhibit 1.

A. About there some place.

61. Q. Now, mark it with the letter "B" so it will be plain?

A. I have.

Witness excused.

Stipulation.

It is stipulated between the parties for the purpose of this trial that during the year 1906 the Tri-State Land Company was the owner of the East ½ of the Southwest ¼ and the West ½ of the Southeast ¼ of Section 18 in Township 22 North of Range 53 West of the 6th P. M. in Scotts Bluff County, Nebraska, and that during that year it constructed an irrigation canal over and across said lands, the same being the canal now belonging to the Respondent, and referred to in the alternative writ of mandamus and the petition of the Relator. That afterwards, during the year 1909 the Tri-State Land Company conveyed its canal and right of way to the Farmers' Mutual Canal Company, which Company on the 17th day of December, 1912 conveyed the canal and right of way to the Respondent Farmers' Irrigation District. That on the 25th day of April 1910, the Tri-State Land Company conveyed to the Relator, Peter O'Shea, all that part of the West half of the Southeast ¼ and the East half of the Southwest ¼ of said Section 18 lying north of and above the right of way of the Farmers' Mutual Canal,

37 and which deed was afterwards on the 4th day of May, 1910 filed for record in the office of the County Clerk of Scotts Bluff County, and there recorded in Book "O" of deeds at page 571 of the deed records of said county; and that said deed described said tract as containing one hundred and twenty and seven tenths acres. That on the 14th day of July, 1911, the Tri-State Land Company conveyed to the Relator, Peter O'Shea, that part of the east ½ of the Southwest ¼ and the west ½ of the Southeast ¼ of said Section 18 lying south of and below the canal and right of way of the Farmers Mutual Canal Company, which deed was on the 20th day of July, 1911, filed for record in the office of the County Clerk of said County, and there recorded in Book "Q" at page 312 of the deed records of said county, and said latter tract was described as containing twenty six and two tenths acres. That at the time each of said tracts of land was conveyed to the Relator the canal

now owned by the Respondent was fully completed and had been in operation a number of years, the canal being built 46 feet wide on the bottom with a carrying capacity of at least seven feet in depth, and is constructed by excavating to a depth of about three feet in the ground, and with banks above the natural surface of the ground to a height of about eight feet, with a slope of one and one-half to one. That the conveyances from the Tri-State Land Company hereinbefore referred to are the only rights under which the relator claims title. That the right of way of the Respondent for its irrigation canal crosses said east ½ of the Southwest ¼ and the West one-half of the Southeast ¼ of said section 18 and contains 13-1/10 acres, a portion of which is occupied by its irrigation canal.
for its irrigation canal crosses said east ½ of the Southwest ¼ and said Section 18 about 100 rods from the southwest corner of said section, and leaves said section 18 about 60 rods from the southeast corner of said section 18; No special permission was ever
38 given Relator to travel the banks of said canal, no objection having been made to this time.

Peter O'Shea, a witness in behalf of the Relator, having been heretofore sworn, was at this time recalled by the Relator for further examination as follows:

Direct examination by Mr. Morrow:

62. Q. State the nature of the road on the bank that you travel to get into this land of yours lying north of the Farmers Irrigation District Canal?

A. It comes up like this—up in a triangular shape, or cone shape, you have got to straddle the bank with your wheel, one wheel working on each side of it, and you cannot go through there with a load at all, the bank abuts right against the approach of the bridge and it is a short turn, and you have to turn off the steep bank to get up on to it.

63. Q. How deep down do you have to go and how high up to get on to it?

A. I would say seven or eight feet, the natural raise of the bank, there has never been any approach built to it.

Witness excused.
Relator rests.
Respondents rest.

Clerk's Certificate.

I, M. H. McHenry, Clerk of the District Court of Scotts Bluff County, Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of the said Clerk in the case of The State of Nebraska on the Relation of Peter O'Shea, Relator, v. Farmers Irrigation District, William Holden, David Henderson and

William J. Otte, Respondents, tried at the February, 1914
39 term of said court.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said court this 20th day of October, 1914.

[SEAL.]

M. H. McHENRY,
Clerk of the District Court.

Reporter's Certificate.

I hereby certify that the foregoing transcript contains all of the evidence adduced or offered on the trial of the above entitled case, tried at the February, 1914, term of the District Court of Scotts Bluff County, Nebraska.

LISTON L. HALL,
Official Reporter.

Reporter's fees $4.80. Paid by Relator.

I hereby certify that the foregoing bill of exceptions contains all of the testimony introduced or offered by the relator and respondents on the trial of the within named cause, together with all of the objections interposed, the grounds therefor, the rulings thereon, and the exceptions taken thereto. And I hereby approve, sign, and settle the same as the Bill of Exceptions of said cause in said court.

R. W. HOBART,
Judge of the Seventeenth Judicial District of Nebraska.

Endorsed: 18880. State ex rel. O'Shea v. Farmers Irrigation District. Bill of exceptions. Supreme Court of Nebraska. Filed Oct. 22, 1914. H. C. Lindsay, Clerk.

40 And afterwards, to-wit, on the 17th day of February, 1915, the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1915, Feb. 17.

The following causes were argued by counsel and submitted to the court:

No. 18880.

STATE ex Rel. O'SHEA
v.
FARMERS' IRRIGATION DISTRICT.

Appeal from Scotts Bluff County.

And afterwards, to-wit, on the 16th day of April, 1915, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1915, Ap'l, '16.

No. 18880.

THE STATE OF NEBRASKA on the Relation of PETER O'SHEA, Appellant,
v.
FARMERS' IRRIGATION DISTRICT et al., Appellees.

Appeal from the District Court of Scotts Bluff County.

This cause coming on to be heard upon appeal from the district court of Scotts Bluff county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of
41 said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed and cause remanded with directions to grant a peremptory writ of mandamus as prayed in relator's petition. That appellant pay all costs incurred herein by him, taxed at $—, and have and recover of and from appellee his costs so expended. For all of whic- execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Fawcett, J. Rose and Sedgwick, JJ., not sitting.

A. M. MORRISSEY,
Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

42 No. 18880.

STATE ex Rel. O'SHEA
v.
FARMERS' IRRIGATION DISTRICT.

Opinion Filed April 16, 1915.

1. A statute which is not uncertain or ambiguous will be construed according to its terms.

2. Section 3438, Rev. St. 1913, which requires the owner, or those in control, of an irrigation ditch or canal to construct and maintain a bridge across the same, for the free and convenient use of the owner of lands lying on both sides of such ditch or canal, applies in all cases, whether the owner owned it at the time the ditch or canal was built, or subsequently acquired by purchase tracts lying on different sides which together constitute one farm.

3. And such statute is not void as authorizing the taking of the property of the ditch company without compensation. The burden so imposed upon ditch companies constitutes a part of the consideration for the valuable right of eminent domain given to such companies by other provisions of the statute.

43 FAWCETT, *J.*:

Relator is the owner of land in the south half of section 18, township 22, range 53, in Scotts Bluff county, which land is traversed by the irrigation canal of respondent. About 120 acres lies north and about 26 acres south of the canal. Relator brought this action in the district court for Scotts Bluff county, to compel respondent to construct a bridge across the canal so as to connect the two tracts of land. From a judgment denying a writ and dismissing his action, he appeals.

The action is based on the provisions of section 3438, Rev. St. 1913, viz: "Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field." The case turns upon the construction to be given to the words "in all cases" immediately following the semicolon. Does the requirement of the section, beginning with those words, relate to lands owned by one person and located on both sides of the ditch at the time the ditch was constructed, or does it relate as well to cases subsequently arising where one person becomes the owner of
44 lands on both sides? In 1906, the Tri-State Land Company, being the then owner of the entire tract of land, constructed the irrigation canal through the same. In 1909, it sold the canal, together with the right of way, to the Farmers Mutual Canal Company. After the construction of the canal and after the sale of the same to the Farmers Mutual Canal Company, the Tri-State Land Company sold the lands in controversy to relator; and at a still later date the Farmers Mutual Canal Company conveyed the canal and right of way to the respondent Farmers Irrigation District. It is contended by respondent, in support of the judgment of the district court, that the canal having been built by the Tri-State Company while it owned the land, the canal was constructed through the lands of a corporation having an interest in the canal, and that, such being the fact, the land, by virtue of such interest of its owner at that time, was thereby excluded from the provisions of the statute, and hence the statute does not apply to the present case; that the statute does not apply where the canal is constructed over the land with the consent of the land owner, and does not apply to cases where the necessity for a bridge occurs at a time subsequent to the

building of the canal. We are unable to concur in this construction. The statute is not ambiguous and must therefore be construed according to its terms. It provides, first, the manner in which the ditch or canal shall be constructed, viz: "in a substantial manner so as to prevent damage to such land." This provision relates solely to the manner of construction. The words "through the lands of any person, company or corporation" do not limit the statute to
45 cases where the ditch cuts through the land of some individual owner, leaving land on both sides thereof. They apply as well to lands abutting on a ditch. As to all such lands, as well as those actually penetrated or cut in two by a ditch, it must be *construed* "in a substantial manner so as to prevent damage to such land." The statute then proceeds to say what shall be done so as to enable owners of lands on both sides of the ditch to have "the free and convenient use" of such lands; and provides that, where it is necessary for the free and convenient use of lands on both sides of the ditch, the owner of the ditch shall erect substantial and convenient bridges across its canal or ditch "in all cases." The words, "in all cases," mean precisely the same, whether they be used, as in the statute, immediately preceding the requirement for the construction of bridges, or immediately following such requirement. If the legislature had intended this requirement to relate only to conditions as they existed at the time the ditch was constructed, it would have been an easy matter to have said so. We see no difference between the rule which should be applied in construing this statute and that applied to the statute requiring railway companies to construct farm crossings across their roads. The principle involved is the same in each. This question is fully and very ably discussed in Quantock v. Missouri, K. & T. R. Co., 117 Mo. App. 469, where, in construing the section of the Missouri statute providing for farm crossings by railroads, it is held that the statute: "was not intended to apply only to farms which the roads divided by its original construction, but should apply where farming lands
46 on both sides of the road are afterwards owned by a single proprietor." This decision was by the Kansas City court of appeals, and being in conflict with a construction of the same statute by the St. Louis court of appeals in Stumpe v. Missouri P. R. Co., 61 Mo. App. 357, the case was transferred to the supreme court for final determination. That court, in 197 Mo. 93, expressly disapproved the holding of the St. Louis court of appeals, and affirmed the holding of the Kansas City court. The syllabus reads: "The statute requiring a railroad which cuts a farm in two, to construct a crossing for the benefit of the owner, applies in all cases where the farm lies on both sides of the railroad, whether the owner owned it at the time the railroad was built, or subsequently acquired by purchase tracts lying on different sides which together constitute one farm." The supreme court cuts its own opinion short, thus (p. 96): "We do not deem it necessary to enter upon a further discussion of this subject because in the opinion of our Kansas City Court of Appeals, by Ellison, J., in this case, reported in 117 Mo. App. 469, everything is said that is necessary to be said and we adopt that as our opinion."

Emulating the example of the Missouri supreme court, we adopt the reasoning of Ellison, J., of the Kansas City Court, as being applicable to the case at bar, and sound in principle. Franklin County v. Wilt & Polly, 87 Neb. 132, strongly relied upon by respondent, does not sustain its contention. In that case the county sought to compel the respondents, who were the owners of a private mill, to construct a bridge over their mill race at a point on their private
47 grounds where it was intersected by a public road laid out seven years after the construction of the mill race. That such a case is clearly distinguishable from the one at bar is shown by the language of Judge Root, as follows (p. 134): "There is nothing in the record to indicate that the mill to which the raceway is appurtenant is a toll mill, that any right exercised in operating it was acquired by the exercise of the right of eminent domain, or that the respondents' business is affected in any manner with a public interest."

It is next urged that if the statute under consideration applies to a case like the one at bar it is unconstitutional, for the reason that it is class legislation in that it does not apply to all waterways but only to irrigation ditches, and State v. Farmers & Merchants Irrigation Co., 59 Neb. 1, is cited in support of the contention. We think counsel are in error. The cited case holds that section 58, art. II, ch. 93*a*, Comp. St. 1897, is void, but also holds that the section is not so intimately connected with the remainder of the act as to be incapable of separation from it and announces the oft-repeated rule that when a separable part of a statute is adjudged to be null the remainder continues in force, unless the unconstitutional part was an inducement to the adoption of the measure, which the opinion holds was not true in that case. Turning then to chapter 93*a*, supra, and eliminating from it section 58 thus held void, we find that section 51 is in the exact language of the section of the statute we are now considering, and under which the present action was instituted. We are unable to see how section 51, supra, is vulnerable to the holding made as to section 58.

48 It is next said that the section under consideration is void, for the reason that respondent is given no compensation for the taking of its property for the purpose of a bridge and that it would take the property of respondent for private purposes. The answer to this contention is that the burden thus imposed upon a ditch company consitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build regardless of the wish of the land owner, it must take that right burdened with the conditions imposed by the legislature. The question of the weight of the burden is one for the consideration of that body and not for the court.

The judgment of the district court is reversed and the cause remanded, with directions to grant a peremptory writ of mandamus as prayed in relator's petition.

Reversed and remanded.

Rose and Sedgwick, JJ., not sitting.

49 And afterwards, to-wit, on the 24th day of May, 1915, there was filed in the office of the clerk of said Supreme Court a certain Motion for Rehearing, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

No. 18880.

THE STATE OF NEBRASKA on the Relation of Peter O'Shea, Appellant,
vs.
FARMERS IRRIGATION DISTRICT et al., Appellees.

Motion for Rehearing.

Come now the appellees and move the court to grant a rehearing of the above entitled case and to set aside the opinion of the court rendered on the 16th day of April, 1915, and upon hearing to vacate and set aside the judgment of reversal rendered by the court for the following reasons:

1. The court erred in holding that section 3438, Revised Statutes 1913, applied to cases where the canal was built through land owned by the builders of the canal.

2. The court erred in holding that the decision as to liability of railroad companies to build private farm crossings are applicable to the statute requiring the building of bridges by the owners of irrigation canals.

3. The court erred in holding that section 3438, Revised Statutes, 1913, was not unconstitutional and void as special legislation.

4. The court misunderstood the argument of the appellees as to the effect of the case of State v. Farmers and Merchants Irrigation Company, 59 Neb. 1. The appellees did not contend as indicated by the opinion that because one section of the act was held void the entire act was void but did and do contend that the reasoning that required section 58 of the act to be held void required that section 51 be likewise held void.

50 5. The court erred in holding that the act did not deprive appellee of its property without compensation and for private purposes.

6. The court erred in holding that the consitutional provision against taking property without compensation was obviated by reason of the fact that the same act gave irrigation enterprises the right of eminent domain. The record in this case affirmatively shows that the right of eminent domain was not used by the builder of the canal on the land in question.

WRIGHT & MOTHERSEAD,
Attorneys for Appellees

Endorsed: 18880. In the Supreme Court of Nebraska. State ex rel. Peter O'Shea, Appellant, vs. Farmers Irrigation District et al.,

Appellees. Motion for Rehearing. Supreme Court of Nebraska. Filed May 24, 1915. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 5th day of June, 1915, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1915, June 5.

No. 18880.

THE STATE OF NEBRASKA on the Relation of Peter O'Shea, Appellant.

v.

FARMERS IRRIGATION DISTRICT et al., Appellees.

Appeal from the District Court of Scotts Bluff County.

This cause coming on to be heard upon motion of appellees for a rehearing herein, was submitted to the court; upon due
51 consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled and a rehearing denied.

A. M. MORRISSEY,
Chief Justice.

And afterwards, to-wit, on the 9th day of June 1915, there was issued out of said supreme court of Nebraska a Mandate to the district court of Scotts Bluff county, in words and figures following, to-wit:

52 Form D.

Mandate.

In the Supreme Court of the State of Nebraska, Sitting at Lincoln January Term, 1915.

To the District Court of the Seventeenth Judicial District, sitting in and for the County of Scotts Bluff, Greeting:

Whereas, in a late action before you, wherein the State of Nebraska on the relation of Peter O'Shea was Plaintiff and Farmers' Irrigation District, William Holden, David Henderson and William Otte, Board of Directors of the Farmers' Irrigation District, were Defendants, the said Defendants recovered a judgment against said Plaintiff upon a transcript of which record and proceedings in your said Court, the said Plaintiff prosecuted an appeal to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court during the January Term, A. D. 1915, a certified

copy of the opinion being hereto attached and made a part hereof, it was considered by said Court that the judgment rendered by you in favor of said Defendants and against said Plaintiff be reversed at the costs of said Defendants taxed at $29.70 and cause remanded with directions to grant a peremptory writ of mandamus as prayed in relator's petition.

Now, therefore, you are commanded, without delay, to proceed and enter an order granting a peremptory writ of mandamus as prayed in relator's petition.

Witness, the Hon. Andrew M. Morrissey, Chief Justice and the Seal of said Court, at Lincoln, this ninth day of June, 1915.

[SEAL.] H. C. LINDSAY, *Clerk*,
By VICTOR SEYMOUR, *Deputy*.

52½ [Endorsed:] Mandate. No. 18880. Supreme Court State of Nebraska. State ex rel. O'Shea v. Farmers' Irrigation District. Costs in Supreme Court, $29.70. $6.00 Balance due Clerk Supreme Court. $6.00 due Pl'ff for transcript. $7.70 due Pl'ff for brief. $10.00 paid at commencement of suit by Wm. Morrow.

53 And afterwards, to-wit: On the 15th day of July, 1915, there was filed in the office of the clerk of said Supreme Court, a Petition for Writ of Error, which said petition was on said day duly allowed by said Supreme Court and the said original Petition for Writ of Error, together with the allowance thereof, is attached hereto and forms a part of this transcript.

54 In the Supreme Court of the State of Nebraska.

FARMERS' IRRIGATION DISTRICT, William Holden, David Henderson, and William J. Otte, Board of Directors of the Farmers' Irrigation District, Plaintiffs in Error,

vs.

THE STATE OF NEBRASKA, on the Relation of Peter O'Shea, Defendant in Error.

Petition for Writ of Error.

To the Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska:

Your petitioners, Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, respectfully show:

1. That on the 16th day of April, 1915, judgment was rendered against them in the above entitled cause by the Supreme Court of the State of Nebraska, and that on the 5th day of June, 1915, the Supreme Court of the State of Nebraska overruled a motion for rehearing in said cause, and that said judgment was final.

2. That the said Supreme Court of the State of Nebraska was the highest court in said state in which a decision in said suit could be had.

3. That in said suit there was involved, and necessary to the determination thereof, the following Federal questions, to-wit:

Whether Section 3438 of the Revised Statutes of the State of Nebraska for the year 1913, was unconstitutional and void
55 as being in contravention of the constitution of the United States, in that it deprived plaintiffs in error of their property without compensation, for private purpose, and without due process of law, and whether said statute was unconstitutional and void as being in contravention of the constitution of the United States of America in that it deprived the plaintiffs in error of the equal protection of the law.

4. That the decision of said Supreme Court of the State of Nebraska was that said statute was valid, and was not unconstitutional and void under the constitution of the United States of America.

5. That said decision was necessary to the judgment given by the said Supreme Court of the State of Nebraska, and without decision thereof the said judgment could not have been given.

Wherefore, your petitioners pray the allowance by Your Honor of a writ of error to remove the record and proceedings in said suit into the Supreme Court of the United States, for its revision thereof, and for a citation directed to the said Peter O'Shea, the relator, for his appearance in said Supreme Court.

L. L. RAYMOND &
WRIGHT & MOTHERSEAD,
Attorneys for Petitioners.

Writ of Error and Citation in the within named case allowed, and bond for supersedeas fixed at $2,000.00.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

56 Endorsed: In the Supreme Court of the State of Nebraska. Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers' Irrigation District, Plaintiffs in Error, vs. The State of Nebraska, on the Relation of Peter O'Shea, Defendant in Error. Petition for Writ of Error. Supreme Court of Nebraska, Filed Jul- 15, 1915. H. C. Lindsay, Clerk. Wright & Mothersead, Attorneys for Plaintiffs in Error.

57 And on the same day, there was also filed in the office of the clerk of said supreme court, certain Assignments of Error, which said original Assignments of Error are attached hereto and form a part hereof.

58 In the Supreme Court of the State of Nebraska.

FARMERS' IRRIGATION DISTRICT, William Holden, David Henderson, and William J. Otte, Board of Directors of the Farmers' Irrigation District, Plaintiffs in Error,

vs.

THE STATE OF NEBRASKA, on the Relation of Peter O'Shea, Defendant in Error.

Assignment of Error.

Comes now, Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers' Irrigation District, plaintiffs in error in the above entitled cause, in the above named court, and assigns the following as manifest error on the face of the record to be corrected in the Supreme Court of the United States, to which this cause is to be removed on writ of error duly allowed for that purpose, to-wit:

1. The court erred in holding that Section 3438 of the Revised Statutes of the State of Nebraska was not null and void, as being contrary to the constitution of the United States, in that it deprived plaintiffs in error of their property without due process of law, and for private purpose and without just compensation.

2. The court erred in holding that said Section 3438 of the revised Statutes of the State of Nebraska for the year 1913, was not null and void as contrary to the constitution of the United States of America, in that it deprived plaintiffs in error of the equal protection of the law.

L. L. RAYMOND &
WRIGHT & MOTHERSEAD, [SEAL.]
Attorneys for Plaintiffs in Error.

59 [Endorsed:] In the Supreme Court of the State of Nebraska. Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers' Irrigation District, Plaintiffs in Error, vs. The State of Nebraska, on the Relation of Peter O'Shea, Defendant in Error. Assignment of Error. Supreme Court of Nebraska. Filed Jul- 15, 1915. H. C. Lindsay, Clerk. Wright & Mothersead, Attorneys for Plaintiffs in Error.

60 And on the same day, to-wit: On the 15th day of July, 1915, there was rendered by said supreme court and entered of record upon the journal thereof in said case, a certain Order allowing Writ of Error and fixing the amount of supersedeas bond, which said Order is in the words and figures following, to-wit:

61 In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA on the Relation of PETER O'SHEA, Relator and Defendant in Error,

v.

FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON and WILLIAM J. OTTE, Board of Directors of the Farmers Irrigation District, Respondents and Plaintiffs in Error.

Order Allowing Writ of Error and Fixing Supersedeas Bond.

And now, to-wit, on this 15th day of July, 1915, this matter being presented to the undersigned, Chief Justice of the supreme court of the state of Nebraska, upon the application of the Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, as plaintiffs in error, against the State of Nebraska ex rel. Peter O'Shea, as defendant in error, for the allowance of a writ of error from the supreme court of the United States to the supreme court of the state of Nebraska, to review a certain judgment entered by the supreme court of the state of Nebraska on the 16th day of April, 1915, whereby the said supreme court of the state of Nebraska reversed a judgment rendered against the said Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, and in favor of the said State of Nebraska ex rel. Peter O'Shea by the district court of Scotts Bluff county, Nebraska, and the petition of the said Farmers Irrigation District et al., plaintiffs in error, being accompanied by assignments of error duly made and filed, it is now ordered that the writ of error as prayed for be allowed, and the clerk of the supreme court of the United States, or the clerk of the United States district court for the District of Nebraska, Lincoln Division, be, and they hereby

62 are, instructed to issue said writ upon the request of the said Farmers Irrigation District et al., plaintiffs in error, and the said Farmers Irrigation District et al., plaintiffs in error, are hereby granted leave to bring up for review before the supreme court of the United States the order and judgment of the supreme court of the state of Nebraska entered as aforesaid on the 16th day of April, 1915, and which said judgment reversed the judgment of said district court of Scotts Bluff county and directed said district court to grant a peremptory writ of mandamus as prayed in relator's petition. Supersedeas bond is hereby fixed at the sum of $2,000.00.

A. M. MORRISSEY,
Chief Justice.

63 And on the same day there was filed in the office of the clerk of said supreme court, a Supersedeas Bond in the sum of Two Thousand ($2,000.00) Dollars, said bond being duly approved by the Chief Justice of said court. A copy of said bond and its approval is attached hereto.

64 In the Supreme Court of the State of Nebraska.

FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON and William J. Otte, Board of Directors of the Farmers Irrigation District, Plaintiffs in Error,

vs.

THE STATE OF NEBRASKA on the Relation of PETER O'SHEA, Defendant in Error.

Know all men by these presents, that we, Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, and Lion Bonding & Surety Company, are held and firmly bound unto the above named Peter O'Shea in the full and just sum of Two Thousand Dollars to be paid to the said Peter O'Shea, his executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and everally by these presents.

Dated this 12th day of July A. D. 1915.

Whereas, lately at a term of the above named court, and in a suit therein pending between the State of Nebraska, on the relation of Peter O'Shea, above named, as plaintiff, and the said Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, as defendants, judgment was rendered against the said Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, and they having prayed and obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit; and a citation directed to the said The State of Nebraska,

65 on the Relation of Peter O'Shea, citing and admonishing him to be and appear at a supreme court of the United States to be held at Washington the 14th day of August, 1915.

Now the condition of the above obligation is such that if the said Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, shall prosecute their said writ to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

FARMERS IRRIGATION DISTRICT.
WILLIAM HOLDEN,
DAVID HENDERSON,
WILLIAM J. OTTE,
By L. L. RAYMOND,
Their Attorney, &
WRIGHT & MOTHERSEAD,
LION BONDING & SURETY COMPANY,
By A. J. SHUMWAY,
Its Attorney in Fact.

Approved by me.
A. M. MORRISSEY.

Endorsed: In the Supreme Court of the State of Nebraska. Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, Plaintiffs in Error vs. The State of Nebraska, on the Relation of Peter O'Shea, Defendant in Error. Supersedeas Bond. Wright & Mothersead Attorneys for Plaintiffs in Error. Supreme Court of Nebraska. Filed Jul- 15, 1915. H. C. Lindsay, Clerk.

66 And on the same day there was filed in the office of the clerk of said supreme court, a writ of Error in said cause with the allowance thereof by the Chief Justice of said cupreme court. Said original writ of error with the allowance thereof, is hereto attached and forms a part hereof.

67 The President of the United States to the Honorable Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said court before you, between Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers' Irrigation District, plaintiffs in error, and The State of Nebraska, on the relation of Peter O'Shea, defendant in error, your court being the highest court of said State having jurisdiction to render judgment in the case; there was drawn in question the validity of Section 3438 of the Revised Statutes of the State of Nebraska, for the year 1913, as to whether said statute was null and void, as contravening the Constitution of the United States of America, and depriving the plaintiffs in error of their property, without due process of law, for a private purpose, and without just compensation; and whether said statute was unconstitutional and void, as contravening the Constitution of the United States of America by denying the plaintiffs in error of the equal protection of the law, and the decision was in favor of the validity of said statute, which said decision was necessary to the rendition of the judgment, and there being manifest error in said decision greatly to the damage of Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers' Irrigation District, the petitioners in error, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the fourteenth day of August, A. D. 1915, in the Supreme Court to be then and there held, that the record

68 may be inspected by said court and justice done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 15th day of July, in the year of our Lord One Thousand Nine Hundred Fifteen.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT,

Clerk of the United States District Court, District of Nebraska.

By J. H. McCLAY, *Deputy.*

Allowed on the plaintiffs in error giving bond according to law in the sum of Two Thousand Dollars, said bond to be supersedeas bond.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

69 [Endorsed:] In the Supreme Court of the United States. Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers' Irrigation District, Plaintiffs in error, vs. The State of Nebraska, on the relation of Peter O'Shea, Defendant in error. Writ of Error. Supreme Court of Nebraska. Filed Jul- 15, 1915. H. C. Lindsay, Clerk. Wright & Mothersead, Attorneys for Plaintiffs in Error.

70 And on the same day there was issued out of said supreme court of Nebraska a Citation in said case, which on the 21st day of July, 1915, was returned to the clerk of said supreme court, with proof of service thereof, and which citation was duly filed in said clerk's office. The said original citation with proof of service thereof, is hereto attached and forms a part hereof.

71 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the State of Nebraska on the relation of Peter O'Shea, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, at Washington, within thirty days from date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Nebraska, wherein Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of The Farmers Irrigation District, were plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 15th day of July, in the year of our Lord, One Thousand Nine Hundred Fifteen.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

Received a copy of the above citation this 19th day of July, 1915.
WM. MORROW,
Att'y for Defendant in Error.

Supreme Court of Nebraska. Filed Jul- 21, 1915. H. C. Lindsay, Clerk.

72 [Endorsed:] In the Supreme Court of the United States. 18880. Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, Plaintiffs in Error, vs. The State of Nebraska on the Relation of Peter O'Shea, Defendant in Error. Citation. Supreme Court of Nebraska. Filed Jul- 21, 1915. H. C. Lindsay, Clerk. Wright & Mothersead, Attorneys for Plaintiffs in Error.

73 And on the same day there was filed in the office of the clerk of said supreme court, a Præcipe, with proof of service thereof, said original præcipe and proof of service being hereto attached and forms a part hereof.

74 In the Supreme Court of the State of Nebraska.

FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN, DAVID HENDERSON, and William J. Otte, Board of Directors of the Farmers Irrigation District, Plaintiffs in Error,

vs.

THE STATE OF NEBRASKA on the Relation of PETER O'SHEA, Defendant in Error.

Præcipe.

To the Clerk of said Court:

Please prepare transcript of the proceedings in the Supreme Court certify the same for the Supreme Court of the United States pursuant to writ of error filed in your office, and include in said transcript the following:

1. Entire transcript of pleadings, judgment and journal entries of the District Court as filed in your office.
2. Transcript of the Bill of Exceptions filed in your office.
3. Opinion and judgment of the Supreme Court rendered in said case.
4. Motion for rehearing (not including, however, brief in support thereof), order of court overruling motion for rehearing and mandate.
5. Petition for writ of error, with allowance of writ.
6. Bond.
7. Writ of error.
8. Assignment of error.

75 9. Citation with acknowledgement of service.

10. This precipe with acknowledgement of service.

L. L. RAYMOND,
WRIGHT & MOTHERSEAD,
Attorneys for Petitioners in Error.

To William Morrow, Esq., Attorney for Relator, Peter O'She Defendant in Error:

You will take notice that plaintiffs in error will file the abo precipe for transcript with the Clerk of the Supreme Court settin

forth the matters to be contained in the transcript of said case, to be filed in the Supreme Court of the United States.

L. L. RAYMOND &
WRIGHT & MOTHERSEAD,
Attorneys for Petitioners in Error.

Received copy of the above notice and precipe this 17th day of July, 1915.

WM. MORROW,
Attorney for Defendant in Error.

Supreme Court of Nebraska. Filed Jul- 21, 1915. H. C. Lindsay, Clerk.

76 [Endorsed:] In the Supreme Court of the State of Nebraska. 18880. Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, Plaintiffs in Error, vs. The State of Nebraska, on the Relation of Peter O'Shea, Defendant in Error. Precipe. Supreme Court of Nebraska. Filed Jul- 21, 1915. H. C. Lindsay, Clerk. Wright & Mothersead, Attorneys for Mothersead, Attorneys for Petitioners in Error.

77 SUPREME COURT, STATE OF NEBRASKA, *ss:*

Certificate of Lodgment.

I, H. C. Lindsay, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 15, 1915, in the case of the Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, plaintiffs in error, v. The State of Nebraska on relation of Peter O'Shea, defendant in error:—

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant in error and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, this August 5, 1915.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska.

78 SUPREME COURT, STATE OF NEBRASKA, *ss:*

Authentication of Record.

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 79, inclusive, are a true, full and complete transcript of the record and proceedings, in the case

of the Farmers Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors of the Farmers Irrigation District, plaintiffs in error, v. The State of Nebraska on relation of Peter O'Shea, defendant in error, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this 5th day of August, 1915.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

79 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Nebraska, in the city of Lincoln, this August 5, 1915.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska.

Cost of Transcript.

Transcript	$17.60
3 Certificates	1.50
3 Rev. Stamps	.30
Binding record	.50
	$19.90

Paid by Plaintiffs in Error.

H. C. LINDSAY, *Clerk.*

Endorsed on cover: File No. 24,876. Nebraska Supreme Court. Term No. 215. Farmers Irrigation District, William Holden et al., Board of Directors of the Farmers Irrigation District, plaintiffs in error, vs. The State of Nebraska on the Relation of Peter O'Shea. Filed August 11th, 1915. File No. 24,876.

Office Supreme Court, U. S.
FILED
JAN 29 1917
JAMES D. MAHER
CLERK

Number 215.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1916.

FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN *ET AL.*, BOARD OF DIRECTORS OF THE FARMERS IRRIGATION DISTRICT, PLAINTIFFS IN ERROR,

VS.

THE STATE OF NEBRASKA ON THE RELATION OF PETER O'SHEA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFFS IN ERROR.

F. A. WRIGHT, *Counsel for Plaintiffs in Error.*

WEKESSER, The Brief Man, Lincoln, Nebraska

Number 215.

IN THE

SUPREME COURT

OF THE

UNITE STATES

October Term, 1916.

FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN *ET AL.*, BOARD OF DIRECTORS OF THE FARMERS IRRIGATION DISTRICT, PLAINTIFFS IN ERROR,

VS.

THE STATE OF NEBRASKA ON THE RELATION OF PETER O'SHEA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFFS IN ERROR.

F. A. WRIGHT, *Counsel for Plaintiffs in Error.*

STATEMENT OF CASE.

The present case originated as an action in mandamus in the District Court of Scotts Bluff County, Nebraska. The relator, Peter O'Shea, commenced his action under the supposed authority of Section 3438, Revised Statutes, Nebraska, 1913, which reads as follows:

> "Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a

substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field."

The material facts in the case are as follows:

In the year 1906, the Tri-State Land Company was the owner of the east half of the southwest quarter ($E\frac{1}{2}SW\frac{1}{4}$) and the west half of the southeast quarter ($W\frac{1}{2}SE\frac{1}{4}$) of section eighteen (18), township twenty-two (22), north, range fifty-three (53, west of the sixth P. M. in Scotts Bluff county, Nebraska. During the year 1906, the Tri-State Land Company constructed an irrigation canal across the land above mentioned, the same being the canal which is now in question. In 1909, the Tri-State Land Company sold its canal and right-of-way to the Farmers Mutual Canal Company, and on the 17th day of December, 1912, the Farmers Mutual Land Company sold and conveyed said canal to the Farmers Irrigation District. On the 25th day of April, 1910, the Tri-State Land Company conveyed to the relator Peter O'Shea, that part of the land hereinbefore described which lies north of and above the right-of-way of the canal hereinbefore mentioned and on the 14th day of July, 1911, conveyed to the relator Peter O'Shea that part of the land hereinbefore described which lies south of and below the canal and right-of-way hereinbefore mentioned. The right-of-way for the canal crosses the land hereinbefore described and contains about thirteen and one-tenth (13.1) acres and divides the land in two parts, (see stipulation, printed record, pp. 18 and 19). That part of the land which lies north of the canal does not abut on any public highway (Stip., printed record, p. 13).

PLEADINGS.

October 22, 1914, Peter O'Shea filed his petition in the district court of Scotts Bluff county, Nebraska, against the

Farmers Irrigation District and the other respondents who are directors of the Farmers Irrigation District, setting forth that the Farmers Irrigation District owned the canal hereinbefore described and its organization as an irrigation district, also setting forth his ownership of the land and the fact that the land was divided into two parts by the canal owned by the Farmers Irrigation District, and that part of the real estate lying north of the canal did not abut upon any public highway and that for his convenient use of the land it was necessary that a bridge be constructed over the same. Also making the formal allegations as to the demands for the construction of the bridge, refusal, etc., and praying that a writ of mandamus be issued compelling the building of a bridge (printed record, pp 1 to 3).

On this petition the district court issued an alternative writ of mandamus (printed record, pp. 5 to 7), and on the 28th day of March, 1914, the respondents filed their answer and return. In this answer and return the respondents admitted the relator O'Shea's ownership of the land and the fact that the canal owned by respondents ran over and across the east half of the southwest quarter and the west half of the southeast quarter of section 18, township 22, north, range 53, west of the 6th P. M. and alleged that the relator owned two separate and several tracts of land, each of which said tracts is a part of the E½ of the SW¼ and the W½ of the SE¼ of said section 18. The answer then described the two several tracts of land and further sets out the facts as to the ownership of all the land in the year 1906, by the Tri-State Land Company, when the Tri-State Land Company constructed the canal, and subsequent sale by the Tri-State Land Company of the canal to the Farmers Mutual Canal Company and sale by the Farmers Mutual Canal Company to the respondent, Farmers Irrigation District. Also the sale by the Tri-State Land Company to the relator, Peter O'Shea, as separate tracts and at different times, of the land now owned by him, the said sales being subsequent to the transfer of the irrigation canal

to the Farmers Mutual Canal Company and further pleads as follows:

> "Respondents for further and additional defense allege and say that section 3438 of the Revised Statutes of the State of Nebraska for the year 1913, which attempts to confer the right on land owners under certain circumstances to compel the owners of irrigation canals to build bridges thereover is unconstitutional, null and void; that said section deprives your respondent, Farmers Irrigation District of its property without due process of law and deprives the respondents, Farmers Irrigation District of equal protection of the law and is class legislation in this, that section purports to require the building of certain bridges only by the owners of irrigation canal and does not apply to other canals of similar nature carrying water such as drainage canals and mill races" (printed record, pp. 7 to 9).

THE JUDGMENT OF THE DISTRICT COURT

On hearing the case, the district court found the facts as hereinbefore set forth, and especially found that the portion of the land occupied by the right-of-way of the canal was never owned by Peter O'Shea, the relator, and denied the writ of mandamus (printed record, p. 11).

On appeal to the Supreme Court of the state of Nebraska, the judgment of the district court was reversed with directions to allow the writ of mandamus as prayed (printed record, p. 21), and in the opinion (printer record, pp 21 to 24, inclusive), the supreme court held that the statute applied, although the canal when built was built over the land by the then owner of the land and that under the statute at any time when a person became the owner of land situated on different sides of an irrigation canal, it was the duty of the owner of the canal to build him bridges. As to the contention of the respondents that the statute was class legislation and deprived the respondents of the equal protection of the law, the court says:

> "It is next urged that if the statute under consideration applies to a case like the one at bar it is unconstitutional, for the reason that it is class legislation in that it

does not apply to all waterways but only to irrigation ditches, and *State* v. *Farmers & Merchants Irrigation Co.*, 59 Neb. 1, is cited in support of the contention. We think counsel are in error. The cited case holds that section 58, art. 11, ch. 93a, Comp. St. 1897, is void, but also holds that the section is not intimately connected with the remainder of the act as to be incapable of separation from it and announces the oft repeated rule that when a separable part of a statute is adjudged to be null the remainder continues in force, unless the unconstitutional part was an inducement to the adoption of the measure, which the opinion holds was not true in that case. Turning then to chapter 93a, *supra*, and eliminating from it section 58 thus held void, we find that section 51 is in the exact language of the section of the statute we are now considering, and under which the present action was instituted. We are unable to see how section 51, *supra*, is vulnerable to the holding made as to section 58."

And as to the contention that this section also deprived respondents of their property without due process of law the court further said:

"It is next said that the section under consideration is void, for the reason that respondent is given no compensation for the taking of its property for the purpose of a bridge and that it would take the property of respondent for private purposes. The answer to this contention is that the burden thus imposed upon a ditch company constitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build regardless of the wish of the land owner, it must take that right burdened with the conditions imposed by the legislature. The question of the weight of the burden is one for the consideration of that body and not for the court."

From this judgment the plaintiff in error took a writ of error for the purpose of reviewing the case in the Supreme Court of the United States, and made the following assignment of error (printed record, p. 29):

"In the Supreme Court of the State of Nebraska.

Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, Board of Directors

of the Farmers' Irrigation District, Plaintiff in Error,

vs.

The State of Nebraska, on the Relation of Peter O'Shea, Defendant in Error.

ASSIGNMENT OF ERROR.

Comes now Farmers' Irrigation District, William Holden, David Henderson and William J. Otte, board of directors of the Farmers' Irrigation District, plaintiffs in error in the above entitled cause, in the above named court, and assigns the following as manifest error on the face of the record to be corrected in the Supreme Court of the United States, to which this cause is to be removed on writ of error duly allowed for that purpose, to-wit:

1. The court erred in holding that section 3438 of the Revised Statutes of the State of Nebraska was not null and void, as being contrary to the constitution of the United States, in that it deprived the plaintiffs in error of their property without due process of law, and for private purpose and without just compensation.

2. The court erred in holding that said section 3438 of the Revised Statutes of the state of Nebraska for the year 1913, was not null and void as contrary to the constitution of the United States of America, in that it deprives plaintiffs in error of the equal protection of the law.

L. L. RAYMOND, WRIGHT & MOTHERSEAD, (seal)
Attorneys for Plaintiffs in Error.

SPECIFICATIONS OF ERROR RELIED ON.

1. The Supreme Court of the state of Nebraska erred in holding that section 3438 of the Revised Statutes of the state of Nebraska, for the year 1913, as construed by said court was not null and void as depriving the plaintiff in error of its property without due process of law in that said section takes the property of plaintiff in error and gives it to the defendant in error for a private purpose.

2. The Supreme Court of the state of Nebraska erred in holding that section 3438 of the Revised Statutes of the state of Nebraska was not null and void as taking the property of

plaintiff in error without due process of law, in that it takes the property of plaintiff in error and gives no compensation therefor.

3. The Supreme Court of the state of Nebraska erred in not holding section 3438 of the Revised Statutes of the state of Nebraska, for the year 1913, null and void in that it deprives plaintiff in error of the equal protection of the law by arbitrarily requiring plaintiff to construct bridges over its irrigation canal when the same burden was not cast upon owners of other artificial waterways.

BRIEF.

1. The Supreme Court of the United States in considering whether a state statute is contrary to the constitution of the United States must accept the construction placed upon the statute by the state's supreme court.

Smiley v. *Kansas*, 196 U. S. 447, 49 L. E. 546.

Gatewood v. *North Carolina*, 203 U. S. 531; 51 L. E. 305.

Louisville & Nashville R. R. Co. v. *Kentucky*, 183 U. S. 503, 46 L. E. 298.

2. Any statute of the state which authorizes the taking of A's property and giving the same to B for B's private use is contrary to the fourteenth amendment of the constitution of the United States and deprives A of his property without due process of law.

Missouri Pacific R. R. Co. v. *Nebraska*, 164 U. S. 403; 41 L. E. 489.

Kaukauna Water Power Co. v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 35 L. E. 1004.

Loan Association v. *Topeka*, 20 Wall. 655; 22 L. E. 455.

Vetter v. *Broadhurst*, (Neb.) 169 N. W. 109.

Welton v. *Dickson*, 38 Neb. 767.

3. Section 3438 Revised Statutes of the state of Nebraska as construed by the Supreme Court of the state of Nebraska,

takes private property for private purpose and is therefore contrary to the fourteenth amendment of the constitution.

Chicago, Milwaukee & St. Paul v. *Wisconsin,* 238 U. S. 491, 59 L. E. 1423.

Great Northern R. R. Co. v. *Minnesota,* 238 U. S. 340, 59 L. E. 1337.

Missouri Pacific R. R. Co. v. *Neb.,* 164 U. S. 403, 41 L. E. 489.

Lake Shore & Michigan Southern v. *Smith,* 173 U. S. 684, 43 L. E. 858.

Eubank v. *Richmond,* 226 U. S. 137; 57 L. E. 156.

Cole v. *City of LeGrange,* 113 U. S. 1; 28 L. E. 896.

4. Any statute which authorizes the taking of private property and does not provide payment of compensation is null and void as contrary to the fourteenth amendment of the constitution which prohibits the taking of property without due process of law.

Chicago, B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226; 41 L. E. 979.

Norwood v. *Baker,* 172 U. S. 269; 43 L. E. 443.

Long Island Water Supply Co. v. *Brooklyn,* 166 U. S. 685; 41 L. E. 1165.

Missouri Pac. R. R. Co. v. *Nebraska,* 217 U. S. 196; 54 L. E. 727.

5. Section 3438 Revised Statutes of the state of Nebraska for the year 1913 arbitrarily discriminates against the owners of irrigation canals in requiring them to build bridges for private parties and thereby deprives the plaintiff in error of the equal protection of the law, said statute not requiring such bridges to be built by the owners of similar watercourses not used for irrigation.

Gulf, Colorado & Santa Fe R. R. Co. v. *Ellis,* 165 U. S. 150; 41 L. E. 666.

Connolly v. *Union Sewer Pipe Co.,* 184 U. S. 540; 46 L. E. 679.

Cotting v. *Godard,* 183 U. S. 79; 46 L. E. 92.

Southern R. R. Co. v. *Green,* 216 U. S. 400; 54 L. E. 536.

Yickwo v. *Hopkins,* 118 U. S. 356; 30 L. E. 220.

State v. *Farmers & Merchants Irrigation Co.,* 59 Neb. 1.

ARGUMENT.

The present action was brought by the relator under authority of section 3438, Revised Statutes of the state of Nebraska, for the year 1913. This section is as follows:

> "Any person, company, corporation, or association constructing a ditch or canal through the land of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field."

In considering this case it is important to consider the interpretation the Supreme Court of the state of Nebraska put upon this statute (see printed record, pp. 21 to 25). The supreme court of the state held that the statute applied where the irrigation canal was originally built by an owner of land across a tract of land then owned by him, where he later sells the canal and subsequent to the sale of the canal sells the land above and below the canal and the right-of-way as separate parcels of land but to the same person.

So construed, the statute is plainly unconstitutional for three reasons: 1. Because it takes the private property of the irrigation canal for a private purpose and not for a public use. 2. Because it takes this property without compensation. 3. Because it casts upon owners of irrigation canals burdens that are not cast upon owners of other artificial waterways, used for the purpose of conveying water.

Taking of Private Property for Private Use.

In the case of *Missouri Pac. R. R. Co.* v. *Neb.*, 164 U. S. 403, 41 L. E. 489, this court had under consideration an order of the railway commission of the state of Nebraska, which directed the Missouri Pacific R. R. Co. to permit certain private persons to build an elevator on the railway company's right-of-way. The Supreme Court of the state of Nebraska held the order valid but on appeal to this court the judgment of the Supreme Court of Nebraska was reversed, this court saying:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of private property of one person or corporation without the owner's consent for the private use of another, is not due process of law, and is a violation of the 14th article of amendment of the constitution of the United States."

In *Loan Association* v. *Topeka*, 20 Wall 655, this court in discussing the validity of certain bonds in aid of the building of a private bridge, said:

> "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B."

Further citation of authority is unnecessary to establish the elementary principle that the property of one person cannot be taken from him and given to others for private benefit.

The Supreme Court of the state of Nebraska has recognized this rule in the case of *Welton* v. *Dickson,* 38 Neb. 767. The court there had under consideration the validity of a statute of Nebraska permitting a person to condemn a right-of-way for private road where his land was shut off from public highway, but the Supreme Court of the State of Nebraska held that the act was unconstitutional as permitting the taking of the private property of A without his consent and transferring it to B for his private use.

Testing then the act in question by the rule established by these authorities, it is plainly unconstitutional as depriving the plaintiff in error of its property without due process of law. The statute arbitrarily provides (as construed by the Supreme Court of the state of Nebraska) that whenever any one person becomes the owner of two separate tracts of land, which are divided by the right-of-way of an irrigation canal then that person may require the owner of the irrigation canal to build a bridge for his private benefit. It not only compels the owner of the canal to give to the owner of the land the right to occupy its right-of-way with the bridge but goes further and requires the owner of the canal to build the bridge itself. The unconstitutionality of the statute is even more evident than the order considered in the case of *Missouri Pacific* v. *Nebraska, supra.* In that case this court held, that it deprived the railroad company of its property without due process of law to permit private individuals for their own use to build an elevator on the right-of-way and thus occupy the right-of-way. Certainly the vice would not have been removed by casting the additional burden upon the railroad company of building the elevator itself.

Whatever action of the state tends arbitrarily to take the property of one person and give it to another person falls within the mischief which the 14th amendment was intended to prevent. In many cases this court has held acts of the state unconstitutional and of no effect where the actual taking of property was much less evident than in the present case.

In the case of *Chicago, M. & St. P. R. R. Co.* v. *Wisconsin*, 238 U. S. 491, 59 L. E. 1423, this court held unconstitutional and void a statute of the state of Wisconsin, requiring sleeping car companies not to make up the upper berth unless the same was actually occupied.

The court in the opinion by Mr. Justice Lamar says:

> "But the language of the act of 1911, now under review, does not remove the fundamental objection to that class of legislation. For as the state could not authorize the occupant of the lower berth to take salable space without pay, neither can the present statute compel the company to give that occupant the free use of that space until it is actually purchased by another passenger. The owner's right to property is protected even when it is not actually in use, and the company cannot be compelled to permit a third person to have the free use of such property until a buyer appears."

In the case of *Great Northern R. R. Co.* v. *Minnesota*, 238 U. S. 340, 59 L. E. 1337, this court considered an order of the state railroad and warehouse commission of Minnesota requiring the railroad to install a scale at a certain point and the court held that the order amounted to the taking of the railroad's property without due process of law.

In *Eubank* v. *Richmond*, 226 U. S. 137, 57 L. E. 156, an ordinance of the city of Richmond permitting two-thirds of the property owners in a block by petition to establish a building line therein as unconstitutional and void as the taking of property without due process of law.

The taking of property in this case is much more evident than in some of the cases cited above. The statute permits the land owner to actually go upon and occupy for his own private use the right-of-way of the irrigational canal company and further requires the owner of the canal to give him the cost of constructing the bridge.

Taking of Property Without Compensation.

Even if the taking were for a public purpose the act would still be void. It is elementary that before private property

can be taken for a public use compensation must be paid to the owner.

This court laid down the rule in *Norwood* v. *Baker*, 172 U. S. 269, 43 L. E. 443, as follows: "It has been adjudged that the due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use."

In *Missouri Pacific R. R. Co.* v. *Neb.*, 217 U. S. 196, 54 L. E. 727, this court held the statute of the state of Nebraska, which required railroad companies to build private switches or side tracks, unconstitutional and void as depriving the railroad company of its property without due process of law. The court in an opinion by Mr. Justice Holmes says:

> "It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present case, the initial cost is said to be $450 in one and $1,732 in the other, and to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay. *Woodward* v. *Central Vermont Ry. Co.*, 180 Mass. 599, 602, 603; 62 N. E. 1051. * * * Moreover, a part of the company's roadbed is appropriated mainly to a special use, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator. Now it is true that railroads can be required to fulfill the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. *Missouri P. R. Co.* v. *Kansas*, Feb. 21, 1910. (216 U. S. 262, ante 472, 30 Sup. Ct. Rep. 330). It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government,—the power commonly called the police power. But railroads, after all, are property protected by the constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

The same reasoning which required this court to hold the act compelling a railroad company to build a switch and side track without compensation, void, necessarily requires this act which requires the owner of an irrigation canal to build a bridge without compensation and permit a part of its right-of-way to be occupied by a bridge built for the exclusive use of one person, to be likewise held void.

Denial of Equal Protection of the Law.

The act is also unconstitutional as denying the owners of irrigation canals the equal protection of the law. It casts upon the owners of irrigation canals a burden which is not cast upon others engaged in the same line of business. It requires them to build bridges where the owners of drainage canals, mill races, canals carrying water for the purpose of generating power, etc., are not required to build. This is an arbitrary discrimination and cannot be upheld.

In the case of *Gulf C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. E. 666, an act of the state of Arkansas required railroad companies to pay an attorney fee of $10.00 in certain cases brought against them, was held void as depriving the railroad companies of the equal protection of the law, the court saying:

> "But it is said it is not within the scope of the 14th amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of an attorney's fee of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age, shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

The court further says as follows:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th amendment and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

In *Connoly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. E. 679, a statute of the state of Illinois against trusts which by specific terms exempted combinations of agriculturalists and stock raisers was held void, the court holding it an arbitrary discrimination which deprived other concerns of the equal protection of the law.

In *Cotting* v. *Goddard*, 183 U. S. 79, 46 L. E. 92, a statute of the state of Kansas regulating stock yards which applied only to stock yards doing a certain amount of business and thus actually applied only to one stock yard in the state was held void, the court holding that the classification was purely arbitrary and deprived the stock yard affected of the equal protection of the law.

The fact that no just ground for classification exists whereby irrigation concerns may be put in one class and other artificial waterways in another class so as to discriminate between them has been fully recognized by the Supreme Court of the state of Nebraska. In the case of *State* v. *Farmers & Merchants Irrigation Company*, 59 Neb. 1, the court had under consideration an act of the state of Nebraska which exempted the owner of irrigation canals from maintaining bridges built where they intersected public highways. The court held the act unconstitutional because it did not apply to all waterways, saying:

> "The rule established by the authorities is that while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public

policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified."

Further saying:

"Applying now to the case before us the test suggested by the authorities cited, it seems perfectly plain that section 58 of the irrigation act can not be sustained without disregarding entirely the constitutional interdict against special legislation. Prior to 1895 all owners of ditches crossing highways were charged by section 110 of the road law with the duty of keeping bridges across their ditches in repair. The legislature, by section 58, assumed to exempt irrigation companies from this burden, while leaving all other ditch owners still subject to it. Upon what ground can this classification be justified? Why should these companies be put in a class by themselves and be given immunity from the burdens which all others, under similar conditions, are required to bear? Their ditches are not, by the section in question, segregated from other private ditches on account of any peculiar characteristics which they possess. The legislation is manifestly as appropriate to the class excluded as to the class included; and the only reason we can discover for diverse legislation with respect to them is the arbitrary and insufficient one of ownership. The obvious purpose of the legislature in dealing with both classes was to secure to the public safe and substantial bridges across private ditches, and there was no more reason for exempting some proprietors from the expense of maintaining their bridges, because engaged in the business of irrigation, than there would be for exempting others who used their ditches to drain wet lands or to protect inclosures. Where the actual situation, both as to the character of the bridges and the occasion and necessity for their construction and maintenance, are precisely the same, legislation would seem to be palpably partial which subjects one class of proprietors to serious burdens from which another class is altogether exempt."

This opinion clearly shows that there can be no just ground for classifying an irrigation canal and imposing upon it burdens which are not imposed upon other canals. This being established there can be no question therefore that the

act deprives the owners of irrigation canals of the equal protection of the law.

The only consideration which the Supreme Court of the state of Nebraska gave to these constitutional questions is the concluding paragraph of its opinion (printed record, p. 24). There attempting to answer the objections that the act deprived the owners of irrigation canals without due process of law, the court says:

> "The answer to this contention is, is that the burden thus imposed upon a ditch company constitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build regardless of the wish of the land owner it must take that right burdened by the conditions imposed by the legislature."

This statement of the Supreme Court of the state of Nebraska might answer the contention as to the constitutionality of the act if the court had not construed the statute as it did. It was the contention of the irrigation district in the Supreme Court of the state of Nebraska, that the act was intended to apply only when land was taken by condemnation proceedings. If the statute had been thus construed then the statement of the court would be consistent, but it cannot apply in the present case. Here it cannot be said that this is a burden imposed upon the ditch company for the valuable right of eminent domain. So far as the record shows the company which constructed this ditch, never at any time exercised the right of eminent domain. Certainly it did not exercise the right of eminent domain so far as the present land is concerned, because the owner of the land at the time the ditch was constructed was also the owner of the ditch. The remark of the Supreme Court of the state of Nebraska, "Without such right it cannot build its ditch through a man's farm. Having accepted the right to build regardless of the wish of the land owner it must take that right burdened by the conditions imposed by the legislation," certainly cannot

apply to the present case. No right of eminent domain was necessary for the builder of the ditch under question to build its ditch through its own land. Surely it cannot be said that an act which would otherwise be unconstitutional as depriving a person of property without due process of law can be held to be constitutional because some other right is given which has not been exercised.

Section 3438, Revised Statutes of the state of Nebraska, for the year 1913, is unconstitutional and void as taking private property for private use without just compensation and in that it deprives the owners of irrigation canals of the equal protection of the law. The judgment of the Supreme Court of the state of Nebraska should therefore be reversed with directions to affirm the judgment of the district court of Scotts Bluff county, Nebraska.

Respectfully submitted,

F. A. WRIGHT,
Counsel for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED
MAR 12 1917
JAMES D. MAHER
CLERK

Number 215.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1916.

FARMERS IRRIGATION DISTRICT, WILLIAM HOLDEN *ET AL.*, BOARD OF DIRECTORS OF THE FARMERS IRRIGATION DISTRICT, PLAINTIFFS IN ERROR.

VS.

THE STATE OF NEBRASKA ON THE RELATION OF PETER O'SHEA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

THOMAS M. MORROW and WILLIAM MORROW, *Attorneys for Defendant in Error.*

WEKESSER, The Brief Man, Lincoln, Nebraska

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BRIEF OF DEFENDANT IN ERROR.

THOMAS M. MORROW and WILLIAM MORROW, *Attorneys for Defendant in Error.*

STATEMENT.

On March 26th, 1895, an Act was passed and approved by the Legislature of the State of Nebraska entitled:

"An Act to provide for the organization and government of irrigation districts and to provide for the acquir-

ing of canals already built or partly constructed; for the acquiring of the right of way to build irrigation ditches or canals and other property," etc.

Chapter 70, Session Laws of Nebr., 1895, p. 269-304.

The Farmers' Irrigation District, plaintiff in error in this case, was incorporated and exists under the provisions of that act.

Section 10 of this act provided among other things as follows:

"The Board, its agents and employees, shall have the right to enter upon any land in the district, to make surveys and may locate the line for any canal or canals and the necessary branches for such location. Said Board shall also have the right to acquire, either by purchase or condemnation, all lands and waters and other property necessary for the construction, use, maintenance, repair and improvement of said canal or canals and works, lands or reservoirs for the storage of water and all necessary appurtenances. Said Board shall also have the right to acquire by purchase any irrigation works, ditches, canals or reservoirs already constructed or partially constructed for the use of said district."

Laws of Neb., 1895, p. 277.

Section 11 provides:

"The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act."

Id. 278.

Section 25 of said act provides:

"The board of directors shall have the power to construct the said works across any stream of water, watercourse, street, avenue, highway, railway, canal, or ditch, or flume which the route of said canal or canals may intersect or cross, in such manner as to afford security for life and property; but the said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming

said intersections and crossings, and grant the privilege aforesaid; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works over and through any of the lands which are now, or may be the property of the state; and also there is given dedicated, and set apart for the use and purposes aforesaid, all water and water-rights belonging to this state within the district."

Id. 287.

At the same session the Nebraska Legislature passed another act entitled:

"An act prescribing regulations for the appropriation, distribution and use of water in the construction and maintaining of canals, ditches and storage reservoirs for the purpose of irrigation, evaporation and water power." etc.

This act was approved April 4th, 1895. Chapter 69, Session Laws of Nebraska for the year 1895, pages 244-269. This act regulated the appropriation of water from the streams of the state, created the State Board of Irrigation for the supervision of appropriations and the distribution of water to irrigators and provided in detail the obligations of persons, associations or corporations acquiring appropriations and constructing and operating canals.

Section 28 of said act provides, *inter alia:*

"Every person, association or corporation hereafter intending to appropriate any of the public waters of the State of Nebraska shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the State Board for a permit to make such appropriation * * * If there is no appropriated water in the source of supply or if a prior appropriation has been made to water the same land to be watered by the applicant, the State Board, through its secretary, shall refuse such appropriation and the party making such application shall not

prosecute such work so long as such refusal shall continue in force."

Id. 252-254.

Section 39 provides *inter alia:*

"All persons, companies or association desirous of constructing a ditch, building a dam, or dams, for the purpose of storing water for irrigation, evaporation and water power purposes, * * * and who shall be unable to agree with the owner or claimant of any lands, necessary to be taken for the site of any such works or any part thereof, touching the compensation and damages, shall be entitled to condemn the right of way over or through the lands of others, for any and all such purposes."

Id. 258.

Section 40 is as follows:

"All persons, companies, corporations, or associations being desirous of constructing any of the works provided for in the preceding sections, shall have the right to occupy state lands, and to obtain right of way over and through any highway in any county in this state for such purposes without any compensation therefor."

Section 41 is as follows:

"In case of the refusal of the owner or claimant of any lands through which such ditch, canal or other works are proposed to be made or constructed, to allow the passage thereof, the person, company or corporation, or association, desiring the right of way, may present to the judge of the county in which such lands are situated, a petition describing the lands to be crossed, the size of the ditch, canal, or works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of five appraisors, disinterested freeholders of said county, to ascertain the compensation to be made, to such owners or parties interested. Upon the filing of said petition the same proceedings for condemnation of such right of way shall be had as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to irrigation ditches, canals and other works provided for in this act."

Id. 259.

Section 42 is as follows:

> "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided."
>
> *Id.* 260.

Section 51 is as follows:

> "Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal, shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field."
>
> *Id.* 263.

Section 52 provides *inter alia:*

> "The right to the use of running water flowing in any river or stream or down any canyon or ravine may be acquired by appropriation by any person, company, corporation, or association organized under the laws of the state of Nebraska."
>
> *Id.* 263.

The two acts above mentioned constitute practically the entire body of the irrigation law of the State of Nebraska.

The Supreme Court of Nebraska held in the case of *Castle Rock Irrigation Canal & Water Power Company* v. *Jorisch,* 67 Neb. 377, that a person or corporation could not exercise the right of eminent domain under the foregoing acts of the legislature without first having obtained a permit from the State Board of Irrigation to divert the water of the state for the irrigation of specific lands.

It does not appear from the record just when plaintiff in error Farmers Irrigation District was organized, but, since

there was no statute authorizing the organization of such districts until March 26th, 1895, it could not have been organized until after the passage of both of the above mentioned acts. It does appear, however, that the canal was not built until 1906, more than ten years after the enactment of said laws and the plaintiff in error did not acquire said canal until December 17th, 1912, more than seventeen years after the passage of said statute.

Tri-State Land Company was the owner of the east half of the southwest quarter (E½ SW¼) and the west half of the southeast quarter (W½ SE¼) of section 18, township 22, range 53 west of the 6th P. M. prior to the time said canal was constructed. In 1906 said company constructed said canal through said land. It was at that time the owner of the canal and this particular tract of land through which it passed.

In 1909 Tri-State Land Company conveyed its canal and right of way to Farmers Mutual Canal Company, which company on the 17th day of December, 1912, conveyed the same to respondent Farmers Irrigation District.

Therefore, in April, 1910, Farmers Mutual Canal Company was the owner of said canal and the right of way therefor and Tri-State Land Company was the owner of the land on each side of this particular section of said canal.

On April 25th, 1910, said Tri-State Land Company conveyed that portion of said tract of land north of said canal to the relator Peter O'Shea, and on July 14th, 1911, conveyed to him that portion of said land lying south of said canal. Therefore, after December 17th, 1912, Peter O'Shea was the owner of the land on each side of said canal and the respondent Farmers Irrigation District was the owner of said canal and the right of way therefor and nothing more.

At the time Tri-State Land Company sold said canal and the right of way therefor to Farmers Mutual Canal Company it did not waive its right to a bridge across said canal, nor

did it at the time it conveyed the land on each side of said canal to the relator reserve the right which went with the land to require the construction of a bridge across said canal.

The relator acquired the land with all the appurtenances thereunto belonging; one of those was the right to a bridge across said canal. There is nothing in the record to show that the right to a bridge had ever been waived or surrendered by relator or any of his grantors.

Prior to the commencement of this action relator demanded the construction of a bridge across said canal by the respondent; the demand was refused and this action was commenced, resulting in judgment for the relator in the Supreme Court of the State of Nebraska.

POINTS AND AUTHORITIES.

1. The respondent Farmers Irrigation District acquired a right of way for said canal and nothing more and the manner in which it acquired the same is immaterial.

Mattice v. *Chicago Great Western R. Co.*, 130 Ia. 749, 107 N. W. 949.

33 *Cyc.*, 166, and cases cited.

2. Without statutory authority irrigation districts could not exist, and without the right of eminent domain it would be impracticable, if not impossible, for an individual or a corporation to engage in the business of irrigation. The right to exist as an irrigation district and the right of eminent domain are privileges which the legislature might grant or withhold at its pleasure. The legislature, having the power to withhold these privileges, had the power to prescribe the conditions upon which they should be exercised. The statutes authorizing the formation of irrigation districts and governing the business which they are authorized to transact, granted such districts certain privileges and imposed upon them certain obligations, among which was the construction of bridges for the benefit of those owning land on both sides of the district ditch, and the acceptance

of the privileges granted constituted an acceptance of the obligations imposed. The district could not accept the benefits granted and reject the burdens imposed by those statutes.

Richmond F. & P. R. Co. v. *Richmond*, 96 U. S. 521, 24 L. Ed. 734.

Mattice v. *Chicago Great Western R. Co.*, 130 Ia. 749, 107 N. W. 749.

White v. *M., K. & T. Co.*, (Okla.) 110 p. 49.

New York etc. R. Co. v. *Railroad Commission*, 162 Mass. 81, 38 N. E. 27.

Buffalo Stone etc. Co. v. *Delaware etc. Co.*, 130 N. Y. 152, 29 N. E. 121.

State v. *Mason City & Fort Dodge R. Co.*, 125 Ia. 131, 52 N. W. 490.

3. The irrigation statutes of the State of Nebraska including the section requiring the construction of bridges entered into and formed part of the charter of the respondent irrigation district and constituted a contract between said district and the state and all parties owning land on each side of its canal.

2 Thompson on Corporations, 2nd Ed. Sec. 1973, p. 1062.

1 Thompson on Corporations, 2d Ed., Sec. 172, p. 180; Sec. 316, p. 350.

Freeport Water Co. v. *Freeport*, 180 U. S. 596, 45 Law Ed. 687.

Hawthorn v. *Calef*, 2 Wall. 10, 17 Law Ed. 776.

Danville v. *Danville Water Co.*, 178 Ill. 299, 306; 53 N. E. 118, 121.

People ex rel. Peabody v. *Chicago Gas & Trust Co.*, 130 Ill. 268, 8 L. R. A. 497.

Chicago Union Traction Co. v. *Chicago*, 199 Ill. 448.

4. Respondent had no vested interest in the construction of the statute under consideration. Therefore, the construc-

tion placed upon said statute by the Nebraska Supreme Court did not render it unconstitutional.

Munn v. *Ill.*, 94 U. S. 113, 134; 24 Law Ed. 77, 87.

Hurtado v. *Calif.*, 110 U. S. 516, 532; 28 Law Ed. 232, 237.

Butterfield v. *Stranahan*, 192 U. S. 470, 493; 48 Law Ed. 525, 534.

Martin v. *Pittsburgh & L. E. Railroad Co.*, 203 U. S. 284, 294; 51 Law Ed. 184, 191.

Chicago & A. R. Co., v. *Tranbarger*, 238 U. S. 67, 76; 59 Law Ed. 1204, 1210.

5. Respondent Farmers Irrigation District is a public corporation, created for a public purpose, to-wit, to furnish water to be usefully and beneficially applied to the irrigation of lands within the district.

Lincoln & Dawson County Irrigation District v. *McNeill*, 60 Neb. 613.

Board of Directors of Alfalfa Irrigation District v. *Collins*, 46 Neb. 411.

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 41 Law Ed. 369.

Tulare Irrigation District v. *Shepard*, 185 U. S. 1, 46 Law Ed. 773.

6. Even if the statute requiring the construction of bridges were not in existence when respondent Farmers Irrigation District was organized or when it acquired said canal, and said district had not voluntarily assumed the obligation imposed thereby, still, the legislature might in the exercise of the police power of the state enact and enforce such a statute without violating any provision of the federal constitution.

Chicago & Alton Railroad Co. v. *Tramburger*, 238 U. S. 67, 76, 77; 59 Law Ed. 1204, 1210, 1211.

Chicago, Milwaukee & St. Paul Railway Co. v. *Minneapolis*, 232 U. S. 430, 438; 58 Law Ed. 671, 674.

St. Louis & San Francisco Railway Co. v. *Matthews*, 156 U. S. 1, 41 Law Ed. 611.

Minneapolis & St. Louis Railway Co. v. *Emmons*, 149 U. S. 364, 37 Law Ed. 769.

Minneapolis & St. Louis Railway Co. v. *Beckwith*, 129 U. S. 26, 32 Law Ed. 585.

ARGUMENT.

I.

Counsel for plaintiff in error on page 9 of his brief says:

> "The Supreme Court of the State held that the statute applied where the irrigation canal was originally built by the owner of land across a tract of land then owned by him, where he later sells the canal and subsequent to the sale of the canal sells the land above and below the canal and the right of way as separate parcels of land but to the same person."

and says that as so construed it is plainly unconstitutional. It is difficult for us to see how those facts have any bearing on the questions involved in this case.

By the conveyance from Tri-State Land Company, the grantees of said company acquired nothing more than the ditch and its right of way. In fact, the only property that the respondent Farmers Irrigation District was authorized to acquire was such as was "necessary for the construction, use, maintenance, repair and improvement" of its canals and irrigation works. Sec. 10, *supra*.

In the case of *Mattis* v. *Chicago Great Western Railroad Company*, 130 Ia. 749, 107 N. W. 949, which was an action to compel the railroad company to construct a private-crossing, it appeared that the railroad company purchased a strip of land 50 feet in width on the north side of the one hundred foot right of way originally acquired, and it, therefore, contended that the 50 foot strip was private property, and that the relator in that case did not own land abutting on each side of the right of way. In that case the court said:

> "If this strip of land is not a part of the appellant's railway it is evident that the plaintiff is not the owner of land on both sides thereof where such strip intervenes between the railway and his land and hence is not entitled to a crossing under the statutes in question. On the other hand, if the strip is a part of the railway, although the railway may be more than 100 feet in width, the statute applies whether the additional land is acquired by purchase or by condemnation."

The court found in that case that the strip was used for railroad purposes and entered judgment requiring the railroad to build the crossing.

There is nothing in this record to show that Tri-State Land Company at the time it conveyed said canal and right of way waived or surrendered its right to require its grantee or grantees to construct a crossing so that it might have access to the land which it owned on both sides of the canal. The right to a crossing was an appurtenant belonging to the land and the conveyance of the land to the relator carried with it that appurtenant.

II.

Section 42, *supra*, provides that:

> "The water of every natural stream not heretofore appropriated within the state of Nebraska is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided."

Section 28 requires all persons desiring to appropriate the public waters of the state to make an application therefor to the State Board, and also provides that if a prior appropriation has been made to water the same land to be watered by the applicant the State Board through its secretary shall refuse such appropriation and the party making such application shall not prosecute such work so long as such refusal shall continue in force. On page 382 of 67 Neb., the court said:

> "The defendant, not having complied with the law, was not entitled to proceed with the contemplated work, and the injunction should not have been allowed."

From the foregoing it is clear that no one had a right to appropriate the waters of the State of Nebraska or to construct irrigation ditches except upon the terms and conditions prescribed by the legislature.

Long prior to the incorporation of the respondent Farmers Irrigation District the legislature prescribed the terms and conditions upon which such districts might be organized and upon which they might engaged in the business of irrigation. Those who caused that district to be organized knew that when it sprung into existence it would acquire all the privileges and obligations granted or imposed by the laws of the State of Nebraska. With this knowledge they caused said district to be organized. It came into existence clothed with all the privileges granted and burdened with all the obligations imposed by the laws of the state. Some of the privileges granted were the right to appropriate the public waters of the state, to acquire private property by condemnation, to own and operate irrigation ditches and to engage in the business of irrigation; and one of the obligations which it assumed was the construction of bridges required by section 51, *supra,* the same being section 3438, Rev. Stat. of Neb. for the year 1913 which is attacked in this action. It accepted the privileges granted by the statute and acquired the ditch subject to the obligation of building those bridges.

The statute under consideration is not materially different from statutes requiring railroads to construct bridges for the convenience of parties owning land on both sides of the railroad. Such statutes have been enforced in many of the states. Among the cases enforcing such statutes are:

Mattice v. *Chicago Great Western R. Co.*, 130 Ia. 749, 107 N. W. 949.

New York etc. R. Co. v. *Railroad Co.*, 162 Mass. 81, 38 N. E. 27.

Buffalo Stone etc. Co. v. *Delaware etc. Co.*, 130 N. Y. 152, 29 N. E. 121.

State v. *Mason City & Fort Dodge Ry.*, 85 Ia. 516, 52 N. W. 490.

Guim v. *Ry.*, 125 Ia. 301, 101 N. W. 94.

Shipp v. *Belt Ry. Co.*, (Tenn.) 180 S. W. 318.

C. & O. Ry. Co. v. *Thompson*, 126 Md. 569, 59 Atl. 49.

Indiana Union Tractor Co. v. *Sensler*, (Ind.) 108 N. E. 44.

Tate v. *Seaboard Air Line Ry.*, 168 N. C. 523, 84 S. E. 808.

Green v. *B. & O. R. Co.*, (Pa.) 91 Atl. 248.

Bennett v. *Gulf C. & S. Ry. Co.*, 146 S. W. 353.

White v. *M., K. & T. R. Co.*, (Okla.) 110, p. 48.

Louisville & N. R. Co. v. *Troutman*, 127 S. W. 474, 137 Ky. 827.

Libby v. *Canadian Pac. Ry. Co.*, 82 Vt. 316, 73 Atl. 593.

Louisville & N. R. Co. v. *Robbins*, 33 Ky., L. Rep. 778, 111 S. W. 283.

Louisville & N. R. Co. v. *Emerson*, 30 Ky., L. R. 1149, 100 S. W. 863.

Baltimore & O. S. W. Ry. Co. v. *Keck*, 89 Ill. Ap. 72.

Kirk v. *Kansas City St. G. Ry. Co.*, 51 La., Ann. 664, 25 So. 463.

Burgess v. *M., K. & T. Ry. Co.*, (Tex.) 41 S. W. 703.

In most of the cases the constitutionality of the statute was not questioned. We know of no case in which it was seriously contended that a statute antedating the construction of a railroad and requiring it to build such crossings was unconstitutional. Nearly all of those decisions are placed on the ground that the railroad company took its grant subject to the obligation of constructing those bridges, and that it should be required to discharge that obligation.

In the case of *New York & N. E. Railroad Company* v. *Board of Railroad Commissioners*, 162 Mass. 81, 38 N. E.

27, it appeared that a statute was passed subsequent to the construction of the railroad which authorized the Board of Railroad Commissioners to order crossings for the benefit of those owning land on both sides of the railroad track. Pursuant to that statute the Board of Railroad Commissioners ordered the construction of three private crossings. The railroad appealed to the courts and contended that the statute was unconstitutional because it authorized the taking of the property of the railroad company without compensation and without due process of law. The court, however, held that a person owning land on both sides of a railroad was, prior to, and independent of, the statute, entitled to a way of necessity across the railroad; that the railroad company acquired its road subject to such right to a way of necessity, and that the statute imposed no new burdens upon the railroad company but merely regulated the enforcement of an obligation which previously existed, and that the statute was not obnoxious to the constitution. In that case the court said:

> "It was within the power of the legislature to regulate the mode of exercising these rights for the safety and convenience of all concerned. The land owner has the right of way by operation of law. The burden of constructing and maintaining the way is put by the legislature on the railroad corporation, not for the benefit of the land owner, but for the protection of the public. The exercise of such a right is attended with a possible risk to passengers and to those using the way, and the legislature may well put upon the railroad company the obligation of keeping its railroad safe for use."

In *White* v. *Mo., Kansas & Texas Railroad Company*, (Okla.) 110, Pac. 48, which was a mandamus to compel the railroad company to construct a private crossing, the court on page 51 said:

> "When the railway company constructed its line across the land of plaintiff, the law existed then as now, requiring it to furnish to him one safe and adequate means of crossing the same. It took its ground with this burden and should discharge it."

In *Buffalo Stone & CeCment Co.* v. *DeBour L. & W. Railroad Company,* 13 N. Y. 152, 29 N. E. 121, which was an action to compel the construction of a crossing, the court in 29 N. E. at page 123 said:

> "The position that the defendant is not liable because defendant is not a corporation of this state, or organized under Chapter 140, Laws 1850, is not tenable. It, having the right to operate its leased lines under the statutes of this state, it must be held to have assumed to discharge the same duties to the public and adjoining owners as are imposed upon such corporations organized and existing under our own statutes."

The case of *State* v. *Mason City & Fort Dodge Railroad,* 85 Ia. 516, 52 N. W. 490, was an action to compel the construction of a private crossing over a railroad. In that case the court said:

> "The section of the statute quoted is a part of the law under which the defendant company accepted the franchises and constructed its railway, and by the admitted facts of the case it has failed to provide an adequate crossing on the land of Mr. Cutler. Its obligation to provide such a crossing arises out of its acceptance of corporate rights under the general laws of the state."

When it is known that the statute attacked in this case was enacted prior to the organization of the respondent irrigation district and the construction of the canal owned by it, the applicability of the language of the Nebraska supreme court becomes apparent. In discussing this feature of the case the court said:

> "It is next said that the section under consideration is void for the reason that the respondent is given no compensation for the taking of its property for the purpose of a bridge and that it would take the property of respondent for private purposes. The answer to this contention is that the burden thus imposed upon a ditch company constitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build regardless of the wishes of the land owner, it must take that right burdened with the conditions imposed by the legislature." (Printed Record, p. 24.)

In other words, this is a case where the law of compensation applies. The district made a bargain with the state by which it agreed that if the state would permit it to acquire and own a ditch and engage in the business of irrigation it would construct a bridge for every person whose land was divided by the ditch. It still retains the benefits of that contract, but it has not yet paid the compensation which it agreed to pay. This is an action to recover the agreed compensation. While the obligation to construct the bridge in question is not strictly contractual, yet it is in the nature of a contract, and we are unable to understand how the enforcement of the obligation which the respondent deliberately assumed and agreed to perform constitutes a taking of property without compensation or without due process of law, and we are likewise unable to see how the statute imposing the obligation can constitute class legislation. In other words, properly understood, there is no constitutional question involved in this case.

III.

The statute attacked as unconstitutional in this action constitutes and remains part of the charter of the respondent, Farmers' Irrigation District, and constitutes a contract between said district and the State and all parties owning lands divided by said canal. Where a corporation is formed under the general laws, as is the respondent Farmers' Irrigation District, the provisions of the statute enter into and form a part of the charter. In 1 Thompson, Corporations, 2nd Ed., section 172, the author quoted the following from *Bixler* v. *Summerfield*, 195 Ill. 147, 62 N. E. 849, as illustrating this principle:

> "Where the corporation is formed under such general laws, its charter does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization is formed. That is to say, the provisions of the statute or general incorporation act enter into and form a part of the charter."

It is further held that the organization of a corporation under the general laws is an acceptance of the provisions of such laws as a part of the charter of a corporation.

Chicago Un. Tract. Co. v. *Chicago,* 199 Ill. 484, 59 L. R. A. 631.

In the above case the court quoted from *Danville* v. *Danville Water Co.,* 178 Ill. 299, 53 N. E. 118, as follows:

> "The charter of a corporation formed under the general incorporation act does not consist of its articles of association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter. Therefore the provisions of the general incorporation act must be regarded as entering into and forming a part of the charter of the defendant in error."

In *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 45 L. Ed. 679, the court in 180 U. S. 596, said:

> "The Supreme Court of the State in passing on the case not only considered the acts of the 9th and 10th of April, 1872, regarding municipalities, but also, as we have stated, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated and it was held that the act 'must be regarded as entering into and forming a part of the charter' of the plaintiff."

In 2 Thompson, Corporations, 2nd Ed., Section 1973, the author says:

> "A corporation will not be permitted to deny the validity of the provisions in its charter which may operate unfavorably to it. It accepts its charter as a whole and takes the burden as well as the benefits. A corporation which proceeds to appropriate lands under powers conferred by its charter is estopped from challenging the constitutionality of a provision therein relating to the mode of assessing the damages."

The author cites in support of the foregoing:

People v. *Murray,* 5 Hill (N. Y.) 468.

Darg v. *Horicon Iron Man. Co.,* 22 Wis. 417.

IV.

Counsel for plaintiff in error contends that the construction based upon the statute in question by the supreme court of the state of Nebraska renders it unconstitutional. The construction placed upon said statute by the Nebraska supreme court was undoubtedly different from what plaintiff in error wanted it to be. However, the case is just the same as if that construction was placed upon the statute before the organization of the respondent Farmers' Irrigation District and before it acquired its canal. In fact, we might go farther than that. If previous to the organization of said district and the acquiring by it of said canal, the court had construed the statute as plaintiff in error contends that it should have been construed, and after it was organized and acquired its canal the court had changed that construction, such a change of construction would not render the statute unconstitutional. Plaintiff in error had no vested interest in any particular construction of the statute. In the case of *Munn* v. *People of Illinois*, 94 U. S. 113, 24 L. Ed. 77, the court, in 94 U. S. at 134, 24 L. Ed. 87, said:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim, of the legislature unless prevented by constitutional limitation. Indeed the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances."

The foregoing statement was quoted with approval in *Hurtado* v. *Calif.*, 110 U. S. 516, 32, 28 L. Ed. 232, 237, and has been approved in the other cases cited under point 4 above.

V.

The defendant in error, Farmers Irrigation District, is a public corporation created for a public purpose and is therefore subject to regulation by the legislature. We do not need

to spend much time on this branch of the case because we do not believe it will be seriously contended that an irrigation corporation is not engaged in a public business which may be regulated by the legislature. If it were not engaged in a public business it could not be vested with powers of eminent domain or of taxation.

The character of the business of irrigation was under consideration in the case of *Fallbrook Irri. District* v. *Bradley*, 164 U. S. 112, 41 L. Ed. 369, and it was there held that the use of water for irrigation in the arid states was a public use, justifying the exercise of the powers of eminent domain and of taxation. In 164 U. S. 161, 41 L. Ed. 389, the court said:

> "While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact in this case is a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition and an effetual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the land owners or even to any one section of the State."

VI.

If the use of water for irrigation is a public use it follows that it is subject to regulation by the legislature. By section 42 above, the legislature of the State of Nebraska has declared it to be a public use and the unappropriated waters to belong to the people of the state. It has provided for the granting of permits for appropriating water and prohibit the construction of irrigation works until such permits were obtained. It has granted the right of eminent domain and the power of taxation to irrigation districts. These are regulations which the legislature had no authority to impose unless the application of water to the irrigation of lands is a public use. Such business is therefore subject to regulation from time to

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time by the legislature, the same as railroads, telegraph companies, telephone companies and other public utilities, exercising the power of eminent domain. Therefore, if the statute under consideration had been enacted subsequent to the formation of the respondent Farmers' Irrigation District and subsequent to the time that it acquired the canal in question, it would still be a valid exercise of the police power of the state.

As shown above, most of the states have enacted and enforced statutes requiring railroad companies to construct private crossings for the benefit of the owners of lands on each side of and adjacent to railroads. We have not been able to find that any case involving the construction of such crossing has come to this court. However, statutes requiring the construction of such crossings are not materially different from statutes requiring the construction of fences, cattle guards and ditches along and across railroads.

This court has held valid a statute requiring railroads to build and maintain fences and cattle guards, *Minneapolis & St. P. Ry. Co.* v. *Beckwith*, 129 U. S. 26, 32 L. Ed. 585, *Minneapolis & S. P. Ry. Co.* v. *Emmons*, 149 U. S. 364, 37 L. Ed. 769; *M. P. Ry. Co.* v. *Humes*, 115 U. S. 512, 29 L. Ed. 463; requiring them to construct transverse openings in their right of way for the removal of surface water which their embankments caused to be accumulated upon lands adjacent thereto, *Chicago & Alton Ry.* v. *Tranbarger*, 238 U. S. 67, 59 L. Ed. 1204; requiring them to construct a bridge over a canal that is constructed across the railroad by a municipality, *C. M. & St. P.* v. *Minneapolis*, 232 U. S. 428, 58 L. Ed. 671; prohibiting the running of locomotives over the principal business streets of a city, *A. C. L. Ry.* v. *Goldsboro*, 232 U. S. 548, 58 L. Ed. 721; making railroad companies liable for all property injured or destroyed by fire, *St. L. & S. F. Ry. Co.* v. *Matthews*, 165 U. S. 1, 41 L. Ed. 611.

In nearly all of the foregoing cases the statutes considered benefitted or protected the owners of private property. It did not follow, however, that because those statutes imposed upon

railroad companies obligations which benefitted the owners of private property, they took the property of the companies for a private purpose. It was held in all of the cases that the obligations were imposed upon the railroad companies in the exercise of the police powers of the state for a public purpose, to-wit: the preservation of the lives or health of the people.

In *M. P. Ry. Co.* v. *Humes, supra*, 29 L. Ed. 466, the court said:

> "The law of Missouri in requiring railroad corporations to erect fences where their roads pass through land or adjoining enclosed or cultivated fields or un-enclosed lands, with openings or gates at farm crossings and to construct and maintain cattle guards, where fences are required sufficient to keep horses, cattle and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police powers of the State to provide against accidents to life and property in any business or employment, whether in the charge of private persons or corporation."

In *M. & St. P. Ry.* v. *Beckwith, supra*, 129 U. S. 35, 32 L. Ed. 588, the court said:

> "From these adjudications it is evident that the 14th amendment does not limit the subjects in relation to which the police powers of the state may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just. The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accidents by collision; not only with other trains but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers. Where these companies have the right to fence in their tracks and thus secure the roads from cattle getting upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large."

In *St. L. & S. F. Ry.* v. *Matthews, supra*, 165 U. S. 26, 1 L. Ed. 621, the court said:

> "To require the utmost care and diligence of the railroad corporations in their precautions against the escape

> of fire from their engines, might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own benefit, rather than upon the owner of the property who has no control over or interest in those instruments."

In *State* v. *Mason City & F. D. Ry. Co.*, 85 Iowa 516, 52 N. W. 490, which was an action to compel the construction of a private crossing, the court said at page 491, column 2 of 52 Northwestern:

> "We are of the opinion that the public has such a right or interest arising out of the grant of the franchise, that it may, if, indeed, it should not, compel the corporation to observe its undertaking. The contention in behalf of the public interest in a crossing is somewhat aided by the fact that the crossing for the passage of stock over the track affects the public safety in the operation of trains."

The public has the same interest in requiring the construction of bridges across irrigation canals that it has in requiring the construction of crossings over railroads; in fact it has a greater interest in the case of irrigation canals than it has in the case of railroads, for it is far more difficult and far more dangerous to the public to cross such canals than it is to cross railroads without crossings.

In this case it was stipulated (printed record, page 19), that the canal was 46 ft. wide on the bottom with a carrying capacity of at least 7 ft. in depth and is constructed by excavating to a depth of about 3 ft. in the ground and with banks above the natural surface of the ground to a height of about 8 ft., with a slope of 1½ to 1. It therefore appears that it is 11 ft. vertically from the top of the bank to the bottom of the canal; that the canal carries at least 4 ft. in depth of water against the bank and above the natural surface of the ground. Assuming that the canal is carrying a 7 ft. depth of water, the width of the water surface would be 87 ft. It is therefore

apparent that a large volume of water is carried against the banks of the canal above the natural surface of the ground.

It may be assumed that the owner of land on each side of the canal is going to cross the canal from one portion of his land to another. If he hasn't a bridge, he will cross without a bridge. If he is required to construct a bridge, he will probably do it in his own way and as cheaply as possible. A person crossing such a canal or constructing a bridge, must necessarily interfere to some extent with the banks of the canal. It is very important that these banks be maintained in a safe condition. If the banks were to give way, it would be certain to damage a large amount of property below the canal. However, the damage that might be occasioned by flooding would be inconsequential compared with the damage that would result to the public in other ways.

When irrigation is most needed, canals used for such purposes are usually taxed to their utmost capacity. That is the time that breaks will occur if they occur at all. When a break occurs in the banks of a large canal the water flowing out through the break usually cuts a deep channel several feet below the bottom of the canal. Such a break makes it impossible to conduct water below the point at which the break occurred. Consequently all land owners below the point at which the break occurs are deprived of the use of water for irrigation. Before such a break can be repaired the water must be entirely shut out of the canal, and it usually requires several days or weeks to make such repairs. In the meantime the crops of all parties using the canal for irrigation are drying up and the public is suffering irreparable damage.

Permitting or requiring individuals owning land on both sides of the canal to construct their own bridges would inevitably result in causing breaks to occur in the banks of the canal and inflicting great and irreparable injury upon the public. It seems to us that under these circumstances, the legislature may in the exercise of the police powers of the state at any time that it deems it advisable to do so, impose

upon the owners of such a canal the obligation of constructing bridges for the use of those owning lands on both sides of the canal.

On page 14 of the brief of plaintiff in error, it is contended that the statute under consideration denies to the owners of irrigation canals the equal protection of the law in that it casts upon them a burden which is not cast upon others engaged in the same line of business. If our contention, that the respondent assumed the obligation imposed by this statute when it was incorporated and acquired the canal is sound, this question does not arise, nor does any other constitutional question arise. But as we read the statute, it does not cast upon the owners of irrigation canals a burden which is not cast upon others engaged in the same line of business. We presume that "the same line of business" means the business of irrigation; certainly those engaged in operating mills or power plants or drainage ditches are not engaged in the same line of business. They are not engaged in the business of irrigation or any similar business. Besides, there is a fundamental difference in the construction of mill races and canals carrying water for power purposes and drainage ditches, and that of irrigation canals. As above shown, irrigation canals are constructed so as to carry a large volume of water above the natural surface of the ground. The other canals mentioned are constructed so as to carry all of the water below the natural surface of the ground.

The statute applies to all irrigation canals and the language of this court in the case of *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512, 524, 29 L. Ed. 466, column 2, is particularly applicable to this case. The court there said:

> "The objection that the statute of Missouri violates the clause of the 14th amendment which prohibits a state to deny any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements, each company is subject to the same liability and from each the same security, by the erection of fences, gates, and catttle

guards, is exacted, when its road passes through land or adjoining inclosed or cultivated fields or un-inclosed lands. There is no evasion of the rule of inequality where all companies are subjected to the same duties and liabilities under similar circumstances."

We respectfully submit that the judgment of the Supreme Court of Nebraska should be affirmed.

THOS. M. MORROW,

WM. MORROW,

Attorneys for Defendant in Error.